CC 1.12/3:9/17

Volume 9, No. 18, Pages 4387 to 4775, August 22 - September 2, 1994

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
*Susan Ness
**Rachelle B. Chong

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. Section 1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 9 FCC Rcd 1 (1994)

*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

DETROIT PUBLIC LIBRARY

OCT 31 1994

DEPOSITORY DOCUMENT

United States Government Printing Office • Washington, D.C.
For Sale by the Superintendent of Documents U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 9
Issue 18

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 4387

Table of Cases
Volume 9
Issue 18

Case Name	Page
ALLTEL Service Corporation	4450
AT&T Communications	4480
AT&T Communications	4486
AT&T Communications	4484
Amendment of Part 1 - Practice and Procedure	4427
Amendment of Part 1 - Proposed Procedures for Informal Complaints	4499
Amendment of Part 22 - License Renewals	4487
Amendment of Part 24 - Narrowband Personal Communications Services	4519
Amendment of Part 24 - Broadband Personal Communications Services	4441
Amendment of Part 76 - TV Market	4387
Amendment of Part 76 - TV Market	4398
Bell Atlantic Telephone Co.	4452
Billed Party Preference for 0+InterLATA Calls	4514
Bishop, Donald D.	4446
Black Television Workshop of Los Angeles, Inc.	4477
Blackship Computer Systems	4469
Blinn College (ERRATUM)	4443
C-TEC Cable Systems of Michigan, Inc.	4517
Cable TV Act of 1992 and Uniform Accounting System	4527
Cable TV Act of 1992 - Video Programming	4415
Cablevision Systems Corporation	4448
Central Missouri State University	4430
Channel 17 Associates, Ltd.	4513
Comcast Cablevision of Mount Clemens, Inc.	4396
Comcast Cablevision of Tallahassee, Inc.	4526
Continental Cablevision	4453
Crow, Robert V.	4445
First Class Radiotelegraph Operator's Certificate (ERRATUM)	4390
Fisher Broadcasting, Inc.	4497
Fox Television Stations, Inc.	4393
Clarification and Amendment of Section 90.209(h)	4462
Illinois Public Safety Plan	4476
Impac Protection Services	4459
Implementation of Sections 3(n) and 332 Communications Act	4400
Implementation of Section 309(j) - Competitive Bidding	4493
Intermedia Communications of Florida, Inc.	4509
Jacor Broadcasting of Colorado, Inc.	4472
Jan Lane, Inc.	4447
Jinma Computer Company	4468
KFS World Communications	4503
KTEH-TV Foundation	4433
National Association of Business and Education Radio, Inc.	4440
Laing, David J.	4461
Lawhorne, Thomas W.	4475

Case Name	Page
McHenry, John	4464
Media America Corporation	4515
Miss Shell Seafood Company	4444
Murphy, Rodney Lynn	4470
National Computer, Inc.	4465
Northern California Area Public Safety Plan	4422
Pacific Bell	4479
Permut, Philip V., Esq.	4391
Plains Television Partnership	4435
Press Broadcasting, Inc.	4431
RCI Long Distance, Inc.	4504
Specialized Mobile Radio and 220-222 MHz Services	4405
Ritchie, Larry	4467
River City License Partnership	4474
Schurz Communications, Inc.	4423
LEC's Cost Allocation Manual - Yellow Pages	4457
Signature Flight Support	4460
Southern Nevada Radio, Inc.	4454
Southwestern Bell Telephone Company	4492
Waiver Request to Use 500-506 MHz Band	4485
Table of Allotments, FM, Caldwell, College Station and Gause, TX	4425
Table of Allotments, FM, Inglis, FL	4428
Tariff Filing Packages Available from ITS, Inc.	4516
User Friendly Computers	4466
Vaugh, Lawrence E., Jr.	4438
Washington Public Safety Plan	4473
Yellow Cab Company of Palo Alto	4471

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 18

Delegated Authority or FCC Number	Page
DA 94 - 773	4390
DA 94 - 829	4387
DA 94 - 842	4391
DA 94 - 854	4422
DA 94 - 857	4396
DA 94 - 886	4443
DA 94 - 887	4393
DA 94 - 888	4492
DA 94 - 889	4480
DA 94 - 890	4425
DA 94 - 891	4428
DA 94 - 895	4398
DA 94 - 897	4433
DA 94 - 898	4430
DA 94 - 899	4431
DA 94 - 901	4514
DA 94 - 903	4438
DA 94 - 905	4423
DA 94 - 906	4444
DA 94 - 907	4445
DA 94 - 908	4446
DA 94 - 909	4447
DA 94 - 910	4459
DA 94 - 911	4460
DA 94 - 912	4464
DA 94 - 913	4461
DA 94 - 914	4465
DA 94 - 915	4466
DA 94 - 916	4467
DA 94 - 917	4468
DA 94 - 918	4471
DA 94 - 919	4469
DA 94 - 920	4470
DA 94 - 921	4484
DA 94 - 922	4440
DA 94 - 923	4479
DA 94 - 924	4448
DA 94 - 925	4450
DA 94 - 926	4452
DA 94 - 927	4454
DA 94 - 928	4472
DA 94 - 929	4453
DA 94 - 930	4485
DA 94 - 931	4486
DA 94 - 932	4474
DA 94 - 933	4457
DA 94 - 934	4515
DA 94 - 935	4516
DA 94 - 937	4473
DA 94 - 938	4476
DA 94 - 940	4503
DA 94 - 941	4504
DA 94 - 942	4509
DA 94 - 946	4517
DA 94 - 948	4497
DA 94 - 949	4526
DA 94 - 953	4513
FCC 94 - 39	4527
FCC 94 - 164	4487
FCC 94 - 191	4400
FCC 94 - 195	4441
FCC 94 - 202	4405
FCC 94 - 203	4415
FCC 94 - 206	4435
FCC 94 - 210	4427
FCC 94 - 211	4499
FCC 94 - 216	4462
FCC 94 - 217	4493
FCC 94 - 218	4519
FCC 94 - 220	4477
FCC 94 - 221	4475

Table of Cases by Docket Number
Volume 9
Issue 18

Docket Number			Page
CC	Dkt.No.90	- 358	4487
CC	Dkt.No.92	- 77	4514
CC	Dkt.No.94	- 93	4499
CS	Dkt.No.94	- 28	4527
CS	Dkt.No.94	- 95	4398
ET	Dkt.No.92	- 100	4519
GEN	Dkt.No.90	- 314	4441
GEN	Dkt.No.90	- 314	4519
GN	Dkt.No.93	- 252	4400
GN	Dkt.No.94	- 90	4405
MM	Dkt.No.88	- 420	4477
MM	Dkt.No.90	- 192	4475
MM	Dkt.No.91	- 58	4425
MM	Dkt.No.92	- 11	4428
MM	Dkt.No.92	- 265	4415
MM	Dkt.No.93	- 212	4387
MM	Dkt.No.93	- 215	4527
PP	Dkt.No.93	- 253	4493
PR	Dkt.No.91	- 228	4476
PR	Dkt.No.91	- 270	4473
PR	Dkt.No.94	- 94	4462

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 9
Issue 18

Rulemaking Number	Page
RM - 7419	4425
RM - 7617	4519
RM - 7760	4519
RM - 7782	4519
RM - 7797	4425
RM - 7798	4425
RM - 7881	4428

Table of Cases by City
Volume 9
Issue 18

City/ State	Page
Alexandria, VA	4440
Baltimore, MD	4460
Bellingham, WA	4461
Birmingham, AL	4513
Boston, MA	4453
Bryan, TX	4443
Caldwell, TX	4425
Champaign, IL	4435
Clearwater, FL	4398
College Station, TX	4425
Corpus Christi, TX	4445
Denver, CO	4465
Denver, CO	4466
Denver, CO	4472
Detroit, MI	4459
Fairhaven, MA	4447
Flushing, NY	4468
Fort Bragg, CA	4446
Gause, TX	4425
Goldsboro, NC	4387
Hagerstown, MD	4423
Inglis, FL	4428
Lakeland, FL	4398
Lakin, WV	4467
Las Vegas, NV	4454
Los Angeles, CA	4477
Marion, NC	4390
Mt. Clemens, MI	4396
New Smyrna Beach, FL	4444
Palo Alto, CA	4471
Salem, OR	4470
San Jose, CA	4469
Seattle, WA	4464
Seattle, WA	4497
Sherman Oaks, CA	4438
South Daytona, FL	4440
St. Petersburg, FL	4398
Sylvester, GA	4475
Washington, DC	4391
Washington, DC	4393

Subject Index
Volume 9
Issue 18

Subject	Page
Broadcast Radio Services - General Rules	
Licenses and permits	
Multiple ownership of broadcast stations in the same service	4435
Program contents	
Station identification	4513
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	4428, 4425
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	4431, 4433
Markets and their communities, list of major	4387
Technical regulations	
Signal leakage, regular monitoring for	4474
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	4503, 4504, 4509
Commercial Radio Operators	
Scope of authority	
Violations of U.S. law prohibited	4390
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	4480, 4486
Delegations of authority - Field Operations Bureau	
Commission en banc, matters to be referred	4444, 4445, 4446, 4447, 4464, 4465, 4466, 4467, 4468, 4471, 4469, 4470, 4459, 4460, 4461
Communications Act of 1934	
Common Carriers	
Extension of lines, certificate for	4503, 4504, 4509
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	4454
Radio, provisions for	
Candidates for public office, facilities for	4497
Radio, provisions relating to	
Licenses, limitation on holding and transfer of	4448

Subject	Page
Domestic Public Fixed Radio Services	
Applications and licenses, processing	
Opposition to applications	4423
Practice and Procedure	
Common carriers: complaints, informal	
Procedure	4499
Ex parte presentations, general information	
Purpose: to specify standards of conduct and procedure	4479
Sanction for violation of any provision of this subpart	4479
Information, general	
Rules, suspension, amendment, waiver	4450
Proceedings, miscellaneous	
Forfeiture proceedings	4444, 4445, 4446, 4447 4464, 4465, 4466, 4467 4468, 4471, 4469, 4470 4459, 4460, 4461
Reconsideration/review of Commission action	
Actions by delegated authority modified or set aside	4472
Actions by delegated authority, application for review of	4390
Reconsideration of a final FCC action, petition for	4430, 4477
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Eligible for licenses, persons	4405
Loading requirements for trunked systems	4438
Public Mobile Service	
Domestic public cellular radio telecommunications service	
Permissible communications	4405
Public land mobile service	
Dispatch stations, limitations on	4405
Statutory Citations Other than Communications	
Obscenity	
Obscene language, broadcasting	4454
Telecommunications Companies: Classes A and B	
Nonregulated activities	4452, 4457
Regulated accounts	4452

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	4480
000.291 Delegated Authority	4492
000.291 Delegated Authority	4516
000.311 Delegated Authority	4444
000.311 Delegated Authority	4445
000.311 Delegated Authority	4446
000.311 Delegated Authority	4447
000.311 Delegated Authority	4459
000.311 Delegated Authority	4460
000.311 Delegated Authority	4461
000.311 Delegated Authority	4464
000.311 Delegated Authority	4465
000.311 Delegated Authority	4466
000.311 Delegated Authority	4467
000.311 Delegated Authority	4468
000.311 Delegated Authority	4469
000.311 Delegated Authority	4470
000.311 Delegated Authority	4471
001.106 Petitions for Reconsideration	4430
001.106 Petitions for reconsideration	4477
001.113 Action set aside by person, panel, or board	4472
001.115 Application for review of action taken pursuant to d	4390
001.1208(a) Restricted Proceedings	4515
001.300 Petition for Waiver	4450
001.450(d)Request for Stay	4396
001.700 Documents are Filed upon Receipt	4427
001.717 Informal Complaints	4499
001.800 Forfeiture Proceeding	4444
001.800 Forfeiture Proceeding	4464
001.800 Forfeiture Proceedings	4445
001.800 Forfeiture Proceedings	4446
001.800 Forfeiture Proceedings	4447
001.800 forfeiture Proceedings	4459
001.800 Forfeiture Proceedings	4460
001.800 Forfeiture Proceedings	4461
001.800 Forfeiture Proceedings	4465
001.800 Forfeiture Proceedings	4466
001.800 Forfeiture Proceedings	4467
001.800 Forfeiture Proceedings	4468
001.800 Forfeiture Proceedings	4469
001.800 Forfeiture Proceedings	4470
001.800 Forfeiture Proceedings	4471
013.620 Violatins; aiding and abetting	4390
021.130(b)(2) General application requirements	4423
021.300 Opposition to application	4423
021.912 Cable television company eligibility requirements	4423
022.911 Permissible Communications	4405
024.101 Multiple Ownership Restrictions	4519
024.102 Service Areas	4519
024.130 Paging Response Channels	4519

024.204 Cellular Eligibility 4400
024.204 Cellular Eligibility 4441
024.711 Installment payments for licenses for frequency Bloc 4493
024.720 Definitions 4493
032.140 Regulated Accounts 4452
032.230 Nonregulated Accounts 4457
032.230 Nonregulated Activities 4452
032.270 Transactions with affiliates 4452
032.270 Transactions with Affiliates 4457
063.001 Contents of Application 4503
063.001 Contents of Application 4504
063.001 Contents of Applications 4509
073.202 FM Table of Allotments 4428
073.202, FM Table of Allotments 4425
073.3555, NOTE 5 MULTIPLE OWNERSHIP (SATELLITE EXCEPTION) 4435
073.658(b) Network affiliation agreements 4515
076.1302 Adjudicatory Proceedings 4415
076.510 Major Television Markets 4387
076.510 Major Television Markets 4398
076.610 Disputes concerning carriage 4431
076.610 Disputes concerning carriage 4474
076.610(b) Complaints regarding qualified NCE stations 4430
076.610(b) Complaints regarding qualified NCE stations 4433
076.905 Standards for Effective Competition 4517
076.906 Presumption of No Effective Competition 4517
076.910 Franchising Authority Certification 4517
076.911 Petition for Reconsideration 4517
076.914 Reveocation of Certification 4517
076.922 Basic Tier Rates 4526
076.922 Rates for the basic service tier 4396
076.922(d)(3)(X) Rates for the basic service tier and the ca 4391
076.923 Rates for equipment and installation 4396
076.923 Rates for Equipment and Installations Used to Receiv 4526
076.944 Commission Review of Franchising Authority Rate Deci 4526
080.159 Operator requirements of Title III of the Communicat 4390
090.603 Eligibility 4405
090.631 Trunked systems loading, construction & authorizatio 4438
22.519 Dispatch Stations 4405
24.709 Eligibility for licenses for frequency Blocks C and F 4493
300.214 Extension of Lines 4503
300.214 Extension of Lines 4504
300.214 Extension of Lines 4509
300.310 Limitations on Holding and Transfer of Licenses 4448
300.315 Facilities for Candidates for Public Office 4497
300.332 Mobile Services 4400
300.353 Radio Officers, watches, auto alarm-radio telegraph 4390
300.503(b) Forfeitures (Notice of Apparent Liability) 4454
300.534 Carriage of local commercial television signals 4431
300.534 Carriage of Local Commercial television signals 4474
300.535 Carriage of noncommercial educational television 4430
300.535 Carriage of noncommercial educational television 4433
300.536 Regulation of Carriage Agreements 4415
400.181464 Broadcasting Obscene or Indecent Language 4454
47 C.F.R. 000.291 delegated authority 4484

47 C.F.R. Section 0.291 delegated authority 4486
500.3095 Character Qualifications 4475
500.503 Forfeiture in cases of rebates and offests 4464
500.503 Forfeiture in cases of rebates and offsets 4444
500.503 Forfeiture in cases of rebates and offsets 4445
500.503 Forfeiture in cases of rebates and offsets 4446
500.503 Forfeiture in cases of rebates and offsets 4447
500.503 Forfeiture in cases of rebates and offsets 4459
500.503 Forfeiture in cases of rebates and offsets 4460
500.503 Forfeiture in cases of rebates and offsets 4461
500.503 Forfeiture in cases of rebates and offsets 4465
500.503 Forfeiture in cases of rebates and offsets 4466
500.503 Forfeiture in cases of rebates and offsets 4467
500.503 Forfeiture in cases of rebates and offsets 4468
500.503 Forfeiture in cases of rebates and offsets 4469
500.503 Forfeiture in cases of rebates and offsets 4470
500.503 Forfeiture in cases of rebates and offsets 4471
600.623 Regulation of Rates 4517
90.209(h) Bandwidth Jimitations 4462

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-212

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Goldsboro, North Carolina
in the Raleigh-Durham, North Carolina
Television Market

REPORT AND ORDER

Adopted: July 28, 1994; Released: August 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is the *Notice of Proposed Rule Making* in the captioned proceeding,[1] issued in response to a petition filed by Group H Broadcasting Corporation ("Group H"), licensee of television station WYED(TV), channel 17, Goldsboro, North Carolina. The *Notice* proposed to amend Section 76.51 of the Commission's Rules,[2] to change the designation of the Raleigh-Durham, North Carolina, television market to "Raleigh-Durham-Goldsboro, North Carolina." Comments in support of this proposal were filed by Group H. Comments in opposition to the proposal were filed by: 1) Cablevision Industries Corp. ("CVI"), an operator of cable television systems within the Raleigh-Durham market including systems in Carrbora and Hillsborough, North Carolina; and 2) WITN-TV, Inc., licensee of WITN-TV, Washington, North Carolina.[3]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine the scope of territorial exclusivity rights that television broadcast station may purchase and helps define the scope of compulsory copyright license liability for cable operators.[4] Certain cable television syndicated exclusivity and network nonduplication rights are also determined by the presence of broadcast station communities of license on this list.[5] Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.[6] Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.[7]

3. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[8] which amended Section 614 of the Communications Act of 1934, as amended ("Act"),[9] requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules.[10]

RULE MAKING COMMENTS

4. According to the Group H, the stations in Raleigh, Durham, and Goldsboro serve substantially the same areas due to the proximity of their transmitter locations and, in particular, the signal of WYED covers substantially all of the communities served by WTVD, WRAL-TV, WLFL-TV and WRDC-TV which are licensed to Raleigh or Durham. The transmitter of WYED is said to be within 7 miles of the transmitters of three of the four stations licensed to Raleigh or Durham and Arbitron, cable systems, newspaper television listings, viewers and advertisers all treat the communities as comprising one market. Inclusion of Goldsboro within the market, it is argued, is essential to the continued viability of WYED and will correct an inequity in the application of the copyright compulsory license rules.

5. WITN-TV, in opposition, argues that no public benefit would result from the change and that the copyright matter could be resolved by the station obtaining "significantly viewed" status in the areas in question. WYED, it is noted, already has must-carry status throughout the Raleigh-Durham "area of dominant influence."[11] Group H's request is also challenged for having included no showing that there is any distinct benefit provided by its programming that is not already provided by the existing stations that now serve Goldsboro.

6. Finally, it is claimed that redesignation of the market as requested would result in significant harm to the viewing public by enabling the Raleigh and Durham stations to extend the reach of their syndicated exclusivity and network nonduplication rights into substantial portions of the Greenville-Washington-New Bern, North Carolina market. This, it is said, would result in disruption to existing service of cable subscribers since stations in the Greenville market may well have duplicating portions of their signals blacked out.

---

[1] 8 FCC Rcd 4780 (1993).
[2] 47 C.F.R. §76.51.
[3] An opposition filed by Capitol Broadcasting Company, licensee of WRAL-TV, Raleigh, North Carolina and Delta Broadcasting, Inc., licensee of WKFT-TV, Fayetteville, North Carolina was subsequently withdrawn.
[4] *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f).
[5] *See* 47 C.F.R. Part 76, subpart F.
[6] See CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974).
[7] *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).
[8] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[9] 47 U.S.C. §614.
[10] *See* Section 614(f) of the Act.
[11] Each county in the contiguous United States is assigned by the Arbitron audience rating service to one "area of dominant influence" or "ADI" based on patterns of television viewing in the county. The "must-carry" rules make use of ADIs to determine carriage rights. *Report and Order in Docket 92-259*, 8 FCC Rcd 2965, para. 37 (1993).

7. CVI, in it opposition, notes that Raleigh is 51 miles from Goldsboro and Durham is approximately 74 miles from Goldsboro and the headend of CVI's system in Carrboro is 73 miles from Goldsboro and that the community of Hillsborough, served from the same headend is approximately 86 miles from Goldsboro. These distances are said to exceed the distances involved in other market hyphenation cases[12] and to militate against the proposed change. Redesignation of the market, it is said, will force CVI to remove a channel that subscribers value and replace it with WYED. Because of this CVI urges that the criteria used for the modification of "area of dominant influence" market areas[13] are also relevant here and weigh against the change. Finally, CVI argues that the Commission should withhold action on this proposal until the Copyright Office rulemaking on whether Commission market redesignation will be followed for copyright purposes has been resolved.[14]

DISCUSSION

8. A "hyphenated market" has been described by the Commission as a television market that contains more than one major population center supporting all stations in the market, with competing stations licensed to different cities within the market area.[15] In evaluating past requests for hyphenation of a market, the Commission has considered the following as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area;[16] (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change.[17] Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[18]

9. Based on the facts presented here, we believe that a case for redesignation of the subject market has been set forth so that this proposal should adopted. It appears from the information before us that the television stations licensed to Raleigh, Durham, and Goldsboro do compete for programming, audience and advertisers throughout most of the proposed combined market area, and that sufficient evidence has been presented to demonstrate commonality between the proposed community to be added to the market designation and the market as a whole. Although Goldsboro is 51 miles from Raleigh and 74 miles from Durham the transmitters are grouped together with four of the five stations licensed to the area having transmitters within seven miles of each other in what Group H describes as the de facto Raleigh-Durham antenna farm. There is no dispute that the coverage patterns of these stations cover common territory. Given that the stations in question compete for programming, audience and advertisers, the equalization of the regulatory status of WYED with stations in Raleigh and Durham through the inclusion of Goldsboro as a named community in the market should permit WYED to operate on an equal footing with the other stations in the market. Such a rationalization of the competitive situation appears to be the public benefit which congress anticipated by instructing the Commission, in Section 614(f) of the Cable Television Consumer Protection and Competition Act of 1992, to make necessary revisions to update the market list.[19]

10. The arguments in opposition do not provide persuasive reason to either deny the proposed rule change or to continue to withhold action on it. While the Copyright Office has pending a proceeding in which the copyright consequences of rule changes of the type here involved are being reviewed, there is no reason why the two proceedings cannot proceed independently or why the Commission's determination to proceed with market changes of this type, as required by the 1992 Cable Act, should be reversed. Further, this proceeding is not intended to address the specific mandatory cable carriage, syndicated exclusivity or network nonduplication obligations of individual cable systems, including those operated by CVI in Carrboro or Hillsborough. Redesignation of the market reflects in the rules the general competitive situation that in fact exists in the local area, allowing the application of the more specific rules, including those relating to "area of dominant influence" changes, to be addressed from the perspective of a properly defined market area. Accordingly, the proposed rule change will be adopted.

11. Accordingly, IT IS ORDERED, that effective [30 days after publication in Federal Register], Section 76.51 of the Commission's Rules IS AMENDED to include Goldsboro, North Carolina, as follows:

Raleigh-Durham-Goldsboro, North Carolina

12. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

13. This action is taken by the Chief, Cable Services Bureau pursuant to authority delegated by Section 0.321 of the Commissions rules. 47 C.F.R. §0.321

---

[12] Citing *e. g., Fresno-Visalia, California*, 57 R.R.2d 1122 (1985) (markets added in the redesignation of the Fesno market were 10, 30, and 35 miles from Fresno).

[13] 47 U.S.C. § 534(H)(1)(C)(ii); *Report and Order in Docket 92-259*, 8 FCC Rcd 2965 (1993).

[14] *Notice of Proposed Rule Making*, 58 Fed. Reg. 34594 (June 28, 1993).

[15] *Cable Television Report and Order*, 36 FCC 2d 143, 176 (1972).

[16] This concern -- that cable carriage might be provided in areas beyond a stations Grade B signal contour -- has reduced relevance under the must-carry rules included in the 1992 Cable Act which are based on "Area of Dominant Influence" geographic market areas rather than on Grade B contours.

[17] *See e. g., Fresno-Visalia, California*, 57 R.R. 2d 1122, 1124 (1985); *TV 14, Inc. (Rome, Georgia)*, 7 FCC Rcd 8591 (1992).

[18] See, e.g., TV 14, Inc. (Rome, Ga.), 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[19] CVI has suggested that the mileages between the communities here involved exceed those involved in other market hyphenation cases. This is clearly not correct. *See Orlando-Daytona Beach-Melboure-Cocoa, Florida*, 57 R.R. 2d 685 (1985) (communities 48, 57, and 72 miles apart) and other situations cited by Group H in its reply comments at page 15.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

First Class Radiotelegraph Operator's Certificate T1-HQ-4271

NAL/Acct No. 215HF0016

Joseph Sawchuk, IV
Marion, North Carolina

ERRATUM

Released: August 19, 1994

The Memorandum Opinion and Order in the above captioned proceeding, FCC 94-87, released May 11, 1994, is corrected to change the adoption date from April 20, 1994, to April 12, 1994, and to reflect that the action was taken by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 2, 1994

Released: August 3, 1994

Philip V. Permut, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Permut:

This is in response to your letters of May 11 and June 16, 1994 on behalf of MTV Networks, seeking clarification of Section 76.922(d)(3)(X) of the Commission's rules governing offset requirements by operators of revenues received from programmers,[1] as applied to MTV Networks' planned experimental home shopping programming service.

You state that MTV Networks has long planned to introduce on an experimental basis limited home shopping programming on its established programming services -- MTV/Music Television, VH1/Video Hits One, and Nick-at-Nite -- as a means of testing viewer demand for new programming in the home shopping marketplace and the prospects for MTV Networks' launching of a new full-time shopping channel. Toward this end, MTV Networks intends to provide home shopping on each of these services in half-hour or one-hour blocks scheduled at various times of the day, for a total of no more than four to five hours per week on each program service. The experiment began on August 1, 1994 and will last five months. You state that introduction of the home shopping programming required no renegotiation or revision of pre-existing cable operator license agreements. However, MTV Networks believes that the experiment will truly succeed only if implemented consistently with industry custom and in concert with MTV Networks' operator affiliates. MTV Networks thus plans to share with its affiliates a five percent commission on shoppingH& revenues generated by the test.[2] You state that five percent payments of this type are standard in the industry.

Section 76.922(d)(3)(x) of the Commission's rules requires an operator to offset any revenues received from programmers against increases in programming costs in calculating programming costs eligible for external treatment in order to ensure that programming costs and the associated mark-up allowed by our rules to be passed through to subscribers are based on the operator's net costs of obtaining the programming. As you note, we have clarified that this requirement may be fulfilled if offset requirements are applied on a channel-by-channel basis, under which any rebates or payments in consideration of carriage from a programmer will be applied to payments from the operator to that programmer.[3] You state, however, that this clarification apparently does not address or contemplate MTV Networks' situation, *i.e.*, where a cable operator's revenues from a part-time shopping programming experiment are less than the license fee paid by the operator for carriage of the pre-existing service on which the home shopping appears. Thus, you request that the Bureau clarify that home shopping commissions earned by an operator from experimental home shopping programming need not be offset against the license fee the operator pays to the programmer providing that service. Finally, you state that the amount of the home shopping commissions paid to cable operators will be minimal, *i.e.*, less than three-tenths of one cent per subscriber per month for only five months, assuming that the periodically scheduled home shopping segments generate revenues at the standard industry pace.[4]

The offset requirement of Section 76.922(d)(3)(X) is designed to protect subscribers by assuring that programming costs fully reflect any rebates or other compensation received by the operator from the programmer in consideration of carriage. Thus, operators generally will be required to offset home shopping revenues received from programmers in measuring costs accorded external cost treatment. Nonetheless, we believe that the home shopping experiment described in your letter warrants a brief, limited waiver of Section 76.922(d)(3)(x) of the Commission's rules. First, we understand that MTV Networks has planned this home shopping marketing test since well before release of our revised regulations and accompanying forms,[5] particularly FCC Form 1210, on which the calculations governing offsetting were described for the first time. Second, the proposal is for a marketing experiment that is intended only to gather market information to determine the potential for a new program service on a temporary basis rather than a proposal for a permanent departure from offset requirements. Third, the record indicates that the amounts of home shopping revenues involved appear to be *de minimis* and do not present a substantial risk of harm to consumers. Fourth, we understand that MTV Networks will remit any sales commissions to their affiliated cable operators in a one-time payment, thus indicating that MTV Networks' proposal does not contemplate an ongoing plan of payments to operators. Finally, the home shopping segments will be scheduled for only a few hours per day and for a limited number of months.

---

[1] 47 C.F.R. § 76.922(d)(3)(x). See also Instructions for Line B1a, FCC Form 1210.

[2] MTV Networks states that, given the limited nature of the test, it will not invest the substantial funds necessary to develop a computer program capable of identifying and tracking the exact amounts of revenues attributable to each operator affiliate. Rather, MTV Networks intends to divide the shopping commissions evenly among its affiliates based on subscriber totals.

[3] We also stated that, where, as in the case of home shopping services, payments are only made from the programmer to the operator, or, where the payments from the programmer exceed payments from the operator, the operator may receive the benefit of the payments without decreasing or increasing charges to subscribers. *See In re QVC Network, Inc.* (released May 9, 1994, Cable Services Bureau); In re The Home Shopping Network (released May 9, 1994, Cable Services Bureau).

[4] Letter from Philip V. Permut to Meredith J. Jones, Chief, Cable Services Bureau, June 16, 1994, at 3.

[5] Press reports of MTV's home shopping experiment first appeared in October 1993. MTV officially announced the service in mid-January 1994.

We will grant this limited waiver subject to the following specific conditions. The waiver from offset requirements is limited to five months duration, and the home shopping segments shall be scheduled for no more than four hours per week on each of MTV Networks' pre-established services -- MTV/Music Television, VH1/Video Hits One, and Nick-at-Nite.[6] In addition, home shopping revenues generated during periods outside of these time limits will require offsetting. Further, we will require that MTV Networks compensate the affiliated operators only in a one-time payment, rather than as part of an on-going regular compensation plan. This will help protect subscribers by assuring that MTV Networks' proposal is intended as a market experiment rather than as part of an on-going plan of compensation by MTV Networks to cable operators. We further limit this waiver of offsetting requirements to the specificcircumstances described in your letter.[7] Under these conditions, we do not believe that the grant of this limited waiver will be detrimental to consumers.

Accordingly, we will grant a limited waiver of Section 76.922(d)(3)(x) of our rules to permit operators to receive commissions from MTV Networks' experimental home shopping programming without offsetting such revenues against programming costs in calculating costs eligible for external treatment.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[6] MTV Networks initially indicated that the experiment could last as long as one year. However, after discussion with Bureau staff, MTV Networks has concluded that accurate, useful data on the prospects for a new home shopping channel can be generated over a period of five months.

[7] We note that other parties seeking to introduce new programming services and share with cable operators the revenues generated by such services must obtain their own waivers of Section 76.922(d)(3)(X) of the Commission's rules addressing such parties' particular circumstances.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 11, 1994

Molly Pauker
Counsel to Fox
Television Stations, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

In Reply Refer to:
1800B-IB

Stanley Neustadt and Robert Jacobi
Counsel to Channel 51 of San Diego
Cohn and Marks
1333 New Hampshire Ave. N.W.
Suite 600
Washington, D.C. 20036-1573

William Potts, Jr.
Counsel to Bay City Television
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633

In Re: Applications of Fox Television Stations to Transmit Program Material to Mexican Broadcast Stations XETV, Tijuana; XHNUL-TV, Nuevo Laredo; and XHRTA-TV, Reynosa Matamoros.

Adopted: August 11, 1994; Released: August 16, 1994

Dear Ms. Pauker, Messrs. Neustadt, Jacobi, and Potts:

This is in regard to applications of Fox Television Stations, Inc. ("Fox") for authority to transmit programming to Mexican broadcast stations pursuant to Section 325(c) of the Communications Act, which governs the electronic export of programming to foreign stations for retransmission to the United States. *See* 47 U.S.C. § 325(c). Fox seeks to transmit programming to Mexican stations XETV, Tijuana; XHNUL-TV, Nuevo Laredo; and XHRTA-TV, Reynosa Matamoros. Due to the proximity of these stations to the U.S./Mexican border, their signals are received consistently in the American communities of San Diego, California; Laredo, Texas; and McAllen-Brownsville, Texas respectively.

Fox's first application sought authority to transmit games of the National Football League (NFL) and other live news, public affairs, sports, and entertainment programs to Mexican station XETV. The application appeared on public notice on March 22, 1994 and generated comments from two interested parties. Bay City Television, a San Diego company which is XETV's agent for programming and advertising matters, filed a statement in support of Fox's application. Channel 51 of San Diego (Channel 51), whose American television station KUSI-TV competes with Mexican station XETV in San Diego, filed a Petition to Deny the application. The pleading cycle generated by these XETV filings was completed in mid-May.

In June, Fox filed a request for special temporary authority (STA) to begin transmitting the NFL games to XETV in the event that we did not act on its underlying XETV application by the beginning of the NFL's pre-season on August 12, 1994. The STA request is limited in scope to the time-sensitive NFL programming that Fox proposes to export. Again, this request received support from Bay City Television and opposition from Channel 51.

In August 1994, Fox filed its requests for foreign programming authority with respect to stations XHNUL-TV and XHRTA-TV. As with XETV, Fox filed both an STA request for NFL games only and an underlying application for long-term authority to broadcast various types of live programming including the NFL games as well as news, public affairs, sports, and entertainment. The underlying application appeared on public notice August 5, 1994. However, Fox's STA requests were not given file numbers or placed on public notice.

We first consider what action, if any, we can take on Fox's underlying applications to transmit various types of programming to Mexico on a long-term basis. Because the public notice period for the underlying XHNUL/XHRTA application will not close until September 6, 1994, we cannot act on that request prior to the opening of the NFL pre-season on August 12, 1994. With respect to the XETV application, a pending Petition to Deny and responsive pleadings raise novel issues concerning the effect of the recently enacted North American Free Trade Agreement on foreign programming cases. In view of these factors we also cannot act on the XETV application before August 12, 1994.

Accordingly, we turn to consideration of Fox's requests for Special Temporary Authority. Fox seeks STAs for XETV and XHNUL/XHRTA to begin on August 12 and to continue until the Commission acts on Fox's underlying applications or until the end of the 1994-95 NFL season, whichever comes first. In support of its STA requests, Fox states that a grant will result in additional programming options for many American residents within the stations' viewing areas, and that without the grant of an STA these residents would be deprived of this programming.[1] Fox also argues that the Commission may grant the requested STAs without giving public notice of the request or affording a 30-day comment period. In this regard, Fox relies on Section 309 (c) (2) (F) of the Communications Act, which provides a specific exemption from the public notice requirements of Section 309(b) for requests to export programming that relate to special events not of a continuing nature. Fox also points to prior staff decisions that have relied on this exemption to grant STAs without public notice and comment periods. In a supporting statement filed in connection with the XETV STA request, Bay City

[1] According to figures supplied by Fox, stations XETV, XHNUL, and XHRTA reach 920,570; 39,980; and 202,940 U.S. television homes respectively.

Television suggests that Fox's STA requests could be granted under the exemption provided in Section 309(f) of the Communications Act for "extraordinary circumstances."[2]

Channel 51 opposes Fox's STA request for station XETV on two grounds. First, it argues that Fox's STA request cannot be granted pursuant to Section 309 (c) (2) (F) without public notice because football games are not special events of a non-continuing nature. Channel 51 points out that an STA for the entire football season would cover 32 games, at least one a week, over a 4 1/2 month period. Channel 51 argues that examples contained in the legislative history of Section 309 (c) (2) (F) support the conclusion that temporary authority should be granted only for special one-time events. *See* S. Rep. No. 690, 86th Cong., 1st Sess. (1959). Second, Channel 51 maintains that it would be unduly prejudiced if we granted an STA during the pendency of its Petition to Deny because Channel 51's objections to the STA and to the underlying application are "irrevocably interlocked."[3] It further argues that the San Diego market could still receive the NFL games absent an STA because American broadcasters, including itself, would be willing to carry this programming.

We have reviewed the parties' contentions and conclude that we "have the authority to grant limited temporary relief to Fox and that such relief is warranted in this case as a means of preserving the availability of NFL programming (which has not itself been alleged objectionable) for substantial American audiences while we consider the merits of Fox's request for more permanent authority to export this and other programming to Mexican stations. We believe that the public benefit of making additional program choices available to these American consumers for a limited period of time outweighs at this junction any countervailing arguments. Neither of Channel 51's basic arguments persuades us to the contrary.

First, with respect to public notice, the authority to export programming to foreign stations for rebroadcast to the United States generally can be granted only after public notice and opportunity for comment. *See* 47 U.S.C. § 309(b). Section 309 (c) (2) (F) of the Communications Act, however, provides an exemption to this requirement for "authorizations pursuant to Section 325[c] where the programs to be transmitted are special events not of a continuing nature." This exemption permits us, under the general public interest standard in Section 309(a) of the Communications Act, to consider the urgency arguments of an applicant for an STA and, where those arguments warrant, to grant such authority without public notice or comment, provided that the relief granted is limited in scope and duration.[4]

We disagree with Channel 51 that authorizing Fox to export more than a single football game would exceed the scope of the public notice exemption for special events not of a continuing nature. The Commission has consistently interpreted the Section 309 (c) (2) (F) exemption to encompass multiple sports events that occur over a limited period of time or that involve a fixed number of games. *See, e.g. Letter from Chief, Audio Services Division re: San Diego Baja Radio Advertising, Inc.* (March 10, 1992) (STA to transmit approximately 40 baseball games over a two month period pending action on underlying application); *Telegram from Chief, Broadcast Bureau re: North American Soccer League* (July 21, 1978) (STA to transmit 4 soccer games over a one month period); *Telegram from Secretary, FCC re: American Broadcasting Company* (September 15, 1965) (STA to transmit 10 football games over a two month period); *Telegram from Acting Secretary, FCC re: Columbia Broadcasting System* (May 4, 1961) (STA to transmit 4 baseball games over a one month period).[5] Accordingly, we are not precluded by Section 309 (c) (2) (F) from granting an STA for a fixed number of broadcasts or games, provided that such an authorization would serve the public interest. Given the public benefit of making additional programming choices available to American consumers, we find it appropriate to consider whether we should grant an STA of limited duration to enable the Commission to complete its evaluation of Fox's underlying applications for long-term authority.

With respect to station XETV, we believe that a minimum of 6 additional weeks is necessary to resolve the issues raised in the underlying case. With respect to the XHNUL-TV/ XHRTA-TV application, that same 6 week period is the minimum necessary for us to determine whether any party opposes the application and, if so, to evaluate Fox's response. Thus, we believe that the most narrowly tailored STA should begin on August 12, 1994 and end on the earlier of September 26, 1994 or the date of Commission action on the relevant underlying Fox applications. This period would cover nine football games aired intermittently over a period of approximately six weeks and, as noted above, is consistent with Commission precedent.[6]

Second, we do not believe that our action herein will unduly prejudice Channel 51 with respect to consideration of its Petition to Deny Fox's underlying application. We are granting an STA for a limited duration that covers only

---

[2] Bay City argues that the extraordinary circumstances include the fact that Fox filed its XETV application in February, and expected to have a decision prior to August. We find it unnecessary to reach the question of whether these are extraordinary circumstances, and therefore do not discuss the diverging views of the parties on this issue.

[3] Channel 51's Petition to Deny is concerned with three issues: (1) whether XETV's programming is deficient for lack of news and public affairs programming; (2) whether the requested authority would hinder the development of American UHF stations; and (3) whether the requested authority would hinder the ability of Channel 51 to obtain programming in an Advanced Television (ATV) format.

[4] It is not customary for the Commission to place STA requests made pursuant to Section 325(c) on public notice because virtually all of the handful of such requests that we receive each year rely on the Section 309 (c) (2) (F) exemption. Another group of applications exempt from public notice are those which are based on "extraordinary circumstances requiring temporary operations in the public interest." 47 U.S.C. § 309 (f).

[5] Each of the above unpublished documents is available for public reference during normal business hours in the Mass Media Bureau's Audio Services Division, Room 302, 1919 M Street, N.W. Washington, D.C.

[6] We further note that Channel 51 had full public notice of the underlying XETV application, was served with a copy of the STA request related to XETV, and had an opportunity to raise its objections to both. With respect to stations XHNUL and XHRTA, the underlying application is currently on public notice and the STA granted herein is short enough that it will expire soon after the date by which any objection must be filed.

a small portion of the authority that Fox requests in its underlying applications. Even with our grant of the STA, the majority of Fox's underlying requests remain pending, including approximately two-thirds of the games remaining in the 1994 NFL season (23 football games over three months), all games in future NFL seasons, and all live news, public affairs, sports, and entertainment programming that Fox wants to transmit to Mexican stations over the next five years. Nothing in this STA decision reaches the merits of the arguments that have been raised against Fox's underlying applications or precludes the Commission from denying those applications as to the remaining programming should it find that the circumstances so warrant. Our action today merely decides that the public should be allowed to receive a limited amount of programming while the Commission considers the merits of the issues raised in the underlying proceedings. Channel 51 argues that a better solution would be for the Commission to deny Fox's STA request, which it believes would give Fox the incentive to seek an American station willing to air its programming in the interim. Such a suggestion, however, raises issues relating to network affiliation and highly individualized contractual matters that are not appropriately resolved in the context of a short-term STA decision. Accordingly, we find grant of a limited STA an appropriate short-term measure.

In view of our discussion above, and pursuant to 47 U.S.C. §§ 309 (c)(2) (F) and 325(c), Fox Television Stations, Inc. is hereby granted special temporary authority to transmit to Mexican stations XETV, XHNUL-TV, and XHRTA-TV, via satellite and/or common carrier facilities, the broadcast pictures and descriptions of National Football League pre-season and regular season football games. This special temporary authority begins on August 12, 1994 and continues through 11:59 p.m. local time on September 26, 1994 or until action on the relevant underlying Fox application (BFP-940217AG or BFP-940802AF), whichever comes first.

FEDERAL COMMUNICATIONS COMMISSION

Roderick K. Porter
Acting Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision of
Mount Clemens, Inc.

Request for Stay
of Local Rate Order of the
City of Mount Clemens

ORDER

Adopted: August 8, 1994; Released: August 9, 1994

By the Chief, Cable Services Bureau:

1. Comcast Cablevision of Mount Clemens ("Comcast") filed on June 16, 1994, an Emergency Request for Stay of a Rate Order of the City of Mount Clemens, Michigan ("Mount Clemens" or the "City") pending Commission resolution of the underlying appeal of the local rate order[1] and the Commission's Letter of Inquiry. Comcast's deadline for compliance with the local rate order was June 1, 1994. The City filed an opposition to the stay petition on June 30, 1994.[2] Comcast asserts that if a stay of the local order is not granted, it will be required to implement refunds to subscribers of about $41,430 for overcharges since September 1, 1993, and will be forced to forego monthly revenues on a going-forward basis of approximately $4,603 a month.

2. Comcast's request for stay centers on Mount Clemens' treatment of Comcast's cableguard service, additional outlet premium charges, and charges for Value Pak, an a la carte package.[3] Specifically, Comcast argues that the City does not have jurisdiction over the regulation of additional premium outlet charges because a cable operator may offer premium programming services at rates that vary with the number of outlets that receive such services. Comcast also asserts that City incorrectly included the Value Pak channels as regulated channels in determining Comcast's regulated rates for basic cable service because Comcast's offering of the package complied with the Commission's regulations regarding a la carte packages in effect on September 1, 1993.

3. As Comcast notes in its petition, its cableguard service, additional outlet premium charges, and Value Pak charges are the subjects of a Letter of Inquiry currently pending with the Commission.[4] This Letter of Inquiry specifically required Comcast to provide detailed information regarding the above charges. The treatment of Comcast's cableguard service, additional outlet premium charges, and Value Pak charges is vital to the City's determination of Comcast's compliance with rate regulation regarding basic tier service and associated equipment.

4. Given that a significant portion of Comcast's stay petition overlaps closely with the issues raised in the Letter of Inquiry and in order to ensure regulatory consistency, we will stay the effective date of the City's local rate order pending the resolution of the Letter of Inquiry.

5. In order to protect the interest of subscribers, we will require Comcast to place in an interest-bearing escrow account the sum Mount Clemens has ordered to be refunded, and accumulate in the escrow account the difference between the rates ordered by the City and the prices charged by Comcast as subscriber fees are collected during the period of the stay. Comcast must furnish the Commission with documentation demonstrating its compliance with this Order within thirty (30) days of release of this Order. Comcast argues that it should not have to establish an escrow account since there is no real risk of later default. However, while an appeal is pending, it serves the public interest to safeguard the rights of subscribers to refunds which have been ordered by the local franchising authority. Therefore, the establishment of such an escrow account is a condition of our granting this Order.

6. Comcast also argues that it should not be required to notify all subscribers of the potential refund and should not be required to maintain subscriber lists and forwarding addresses of subscribers who move out of the area. We will not require Comcast to do so. In several recent orders in which we granted stay requests under similar circumstances, we have required operators to notify subscribers of the possibility of their receiving refunds and to advise subscribers who may be planning to relocate outside the franchise area to provide the operator with a forwarding address to which refunds may be delivered.[5] In every such case, the operator either volunteered to so notify subscribers or did not oppose the requirement. Here, Comcast states that, in the event that it loses its appeal and is required to issue refunds, it will elect to issue refunds to existing, rather than past, subscribers.[6] The Commission's rules give the operator the option of determining the methodology of implementing a refund.[7] Comcast, by stating its

---

[1] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. See Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] In a phone call to Commission staff, James T. Hogan, counsel for the Mount Clemens, asserted that the City did not receive the Stay Request until June 23, 1994.

[3] We note that Comcast's stay petition raises several other contentions with respect to Mount Clemens's local rate order, including whether the City failed to support the manner in which it set the systems's rates because the City did not have Comcast's Worksheet 2; whether the City violated Comcast's due process rights because it mandated refunds to begin less than 60 days after the date of the local rate order; and whether the City failed to act or issue an accounting order within the time period prescribed by § 76.933.

[4] See *Letter of Inquiry, Comcast Cablevision of Mount Clemens, Inc.* LOI-93-19 (issued December 13, 1994).

[5] See, e.g., *Century Southwest Cable Television Corp.*, DA 94-463 (Rel. May 9,1994); and *SBC Media Ventures, Inc.*, DA 94-702 (Rel. June 23, 1994).

[6] See Emergency Request for Stay at iii.

[7] See 47 C.F.R. § 76.942(d).

intention to make any refund payments to existing subscribers, makes a requirement to notify and track subscribers unnecessary.[8]

7. Accordingly, IT IS ORDERED, pursuant to § 1.45(e) of the Commission's rules (47 C.F.R. § 1.45(e)), that the local rate order adopted by the City of Mount Clemens, Michigan establishing rates for regulated basic tier service and associated equipment provided by Comcast Cablevision of Mount Clemens, Inc. is STAYED pending the resolution of the Letter of Inquiry. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules (47 C.F.R. § 0.321).

8. IT IS FURTHER ORDERED that the amount of refunds required in Mount Clemens' local rate order, and the amount of the difference between the rates ordered by the City and the subscriber fees collected during the stay period, SHALL BE PLACED by Comcast in an interest-bearing escrow account, and that proof shall be filed with the Commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

William Johnson
Acting Chief, Cable Services Bureau

[8] As noted in paragraph 5 above, the need to protect subscribers' interests in potential refunds remains. Under our rules, as noted *supra* note 11, cable operators have the option of determining both the class of subscribers who will receive refunds and the method of disbursements of those refunds. Even if an operator were to chose to refund overcharges to subscribers through specifically identified, one-time credits on bills, rather than issuing actual refunds, the need to protect subscribers' interest in these monies continues. Hence, although Comcast will not be required to either notify subscribers of the potential refund or maintain subscriber lists and forwarding addresses of subscribers who move out of the area, the necessity of Comcasts' establishing an escrow account, as detailed above, remains.

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-95

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Lakeland in the Tampa-
St. Petersburg-Clearwater, Florida
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 12, 1994; Released: August 15, 1994

Comment Date: September 14, 1994
Reply Comment Date: October 14, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by Public Interest Corporation, the licensee of television station WTMV(TV), Channel 32, Lakeland, Florida, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the community of Lakeland to the Tampa-St. Petersburg-Clearwater television market.[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators.[2] Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities.[3] Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support.[4]

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[5]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,[6] which amended Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.[7]

THE PETITION

5. According to the petitioner, Lakeland is located 31 miles from Tampa, which is described as the principal city in the market, 47 miles from St. Petersburg, and 50 miles from Clearwater. Lakeland is said to be located inside the Tampa-St. Petersburg Arbitron Area of Dominant influence ("ADI") and to have shared economic, social and cultural interests with the other named communities in the market which link these communities together as a single television market. It attaches maps of its city grade, Grade A and Grade B contours and of the Grade B signal coverage contours of the other stations in the market. These show that its city grade contour encompasses part of and its Grade A contour encompasses substantially all of Tampa; its Grade B contour encompasses all of St. Petersburg; and the signal contours of all of the stations in the market substantially overlap with its. Newspaper program listings, it is said, recognize WTMV(TV) as a Tampa market station, program suppliers charge it rates for programming which recognize that WTMV(TV) is an integral part of the Tampa ADI, and national advertisers buy time on WTMV(TV) is recognition of its status as a station in the Tampa market.

---

[1] *See Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[2] *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f).

[3] *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974).

[4] *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

[5] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[6] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[7] The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.50 (1993).

6. Petitioner further states that, although WTMV(TV) is unavoidably competitive with the other market-area stations, it is disadvantaged in this competition by having to compete with other stations in the market without comparable cable television carriage rights. Although it is entitled to carriage on area cable systems by virtue of its inclusion in the Tampa-St. Petersburg ADI,[8] because Lakeland is not a designated community in the Section 76.51 market listings, it is considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.[9] As a result, petitioner states, it faces additional copyright fees attendant to its carriage as a "distant signal"[10] that could run "into the millions of dollars."

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Tampa, St. Petersburg, Clearwater, and Lakeland do compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market. Accordingly, comment is requested on the proposed addition of Lakeland to the Tampa-St. Petersburg-Clearwater, Florida television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 14, 1994**, and reply comments on or before **October 14, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

11. This action is taken by the Chief, Cable Television Bureau pursuant to authority delegated by Section 0.321 of the Commission's rules. For additional information on this proceeding, contact William H. Johnson (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

---

[8] (*See* Section 76.56(b) of the Commission's Rules.

[9] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Lakeland as a designated community in this market list generally results in WTMV(TV)'s classification as a "distant signal" for market-area cable systems more than 35 miles from Lakeland. By amending Section 76.51 of the Rules to include the community of Lakeland in the market as proposed, the petitioner asserts that market-area cable systems will be able to carry its signal on an equal basis with other stations in the market without incurring distant signal liability.

[10] Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket 92-259, *supra*, at 2973-74.

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and 332
of the Communications Act

Regulatory Treatment of Mobile Services

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1994; Released: July 20, 1994

Comment Date: August 9, 1994
Reply Comment Date: August 19, 1994

By the Commission:

I. INTRODUCTION

1. In a prior Further Notice of Proposed Rule Making in this docket, the Commission requested comment on whether it should establish a general cap on the amount of commercial mobile radio service (CMRS) spectrum for which an entity may be licensed in a particular geographic market.[1] The purpose of that proposal is to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market. Additionally, the *Spectrum Cap Notice* sought comment on rules for administering a spectrum cap, if the Commission adopted a spectrum aggregation limit. The *Spectrum Cap Notice* invited comments on whether the Commission should apply personal communications services (PCS) spectrum aggregation and cellular-PCS cross ownership attribution standards, adopted in the *Broadband PCS Order*,[2] to a general CMRS spectrum cap.

2. On June 13, 1994, the Commission released an Order reconsidering and clarifying the rules for broadband PCS. The *Broadband PCS Reconsideration Order* retained certain limitations on the amount of PCS spectrum that can be obtained in any geographic service area. Generally, an entity may acquire attributable interests in a maximum of 40 MHz of licensed broadband PCS spectrum. Parties with attributable cellular interests, however, may obtain only 10 MHz of licensed broadband PCS spectrum if the population in the cellular service area overlaps 10 percent of the population in the relevant PCS market. In addition, after January 1, 2000, entities with attributable cellular interests may acquire an additional 5 MHz of broadband PCS spectrum, for a total of 15 MHz of PCS spectrum in their cellular service areas. The *Broadband PCS Reconsideration Order* also specified certain interests that the Commission would consider attributable interests in order to determine the maximum amount of PCS spectrum for which an entity may be licensed.[3]

3. On June 29, 1994, the Commission adopted an Order establishing competitive bidding procedures for broadband PCS.[4] The Commission adopted a "Competitive Opportunity Plan" in the *Broadband PCS Auction Rules Order*, under which "entrepreneurs' blocks" are established as a means of fulfilling the statutory mandate to ensure that businesses owned by minorities or women (or both), small businesses, and rural telephone companies[5] are provided with full opportunities to participate in providing broadband PCS services. The Competitive Opportunity Plan, *inter alia*, establishes installment payment plans for applicants eligible for entrepreneurs' block licenses, and also establishes a system of bidding credits for small businesses and businesses owned by minorities or women (or both).

4. The purpose of this Second Further Notice is to explore whether the Commission should consider certain additional non-equity relationships to be attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap. In addition, we seek comment regarding whether any attribution rules we adopt in this proceeding should apply differently depending on whether the applicant or licensee involved is a designated entity. We also seek comment regarding how such non-equity relationships should be construed in the context of determining whether the designated entity has *de facto* and *de jure* control of the licensee. Finally, commenters should address how such relationships in the designated entity context balance the need to allow designated entities to attract needed expertise, capital and infrastructure while avoiding the creation of fronts or shams.

II. DISCUSSION

5. One of the purposes of this proceeding is to examine resale agreements,"[6] management contracts, joint marketing agreements, and other similar arrangements for the purpose of determining whether these arrangements should be treated as attributable interests in applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. We recognize at the outset that any agreement that confers on a party

---

[1] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, FCC 94-100 (released May 20, 1994) (*Spectrum Cap Notice*).

[2] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon.*, Memorandum Opinion and Order, FCC 94-144 (released June 13, 1994) (*Broadband PCS Reconsideration Order*).

[3] *Broadband PCS Reconsideration Order*, at paras. 98-140.

[4] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178 (adopted June 29, 1994)(*Broadband PCS Auction Rules Order*).

[5] These various entities are collectively referred to as "designated entities."

[6] For this purpose, resale arrangements include arrangements characterized as "capacity leasing agreements" between private carriers who will be treated as CMRS providers as of August 10, 1996, and their customers.

other than the licensee *de facto* control over an FCC-licensed facility will be considered an attributable interest.[7] Therefore, commenters should address whether there are relationships, not included in the PCS attribution rules, that do not rise to the level of control, but nonetheless should be considered attributable because these interests may affect the incentive or ability of PCS and other CMRS licensees to compete vigorously in the marketplace, or because they may affect the number of effective competing providers or the independence of pricing decisions by service providers.

A. Management Agreements

6. We request comment on whether management agreements or similar arrangements that do not confer *de facto* control on a party other than the licensee should be considered attributable interests. We are concerned, for example, that a management agreement may permit the manager access to market sensitive information (*e.g.*, business plans, customer lists, product and service development, marketing strategies); if the manager is also a licensee offering a competing service, access to this information might enable it to impede vigorous competition. We also seek comment regarding the issue of whether such management agreements, although not amounting to *de facto* control, may involve levels of integration between the managed licensee and the manager's company which have the effect of reducing competitive choices in the marketplace or of creating a sham or front corporation to take advantage of designated entity provisions.

7. By way of background, we note that we have established several criteria that we have determined to be probative with regard to the issue of whether a licensee, through management agreements or other means, and in contravention of our rules, has relinquished control of and responsibility for its licensed facilities. These criteria, first articulated in *Intermountain*, include the following questions:[8]

- Does the licensee have unfettered use of all facilities and equipment? If the licensee retains such use, this will support a finding that the licensee has not relinquished control to a third party through a management agreement or other arrangement.
- Has the licensee relinquished control of daily operations? Retention of such control by the licensee contributes to a finding that the licensee has not relinquished control over the licensed facilities.
- Does the licensee determine and carry out policy decisions, including the preparation and filing of applications with the Commission? If it is demonstrated that the licensee has retained control of policy decisions, this serves as another contributing factor in determining that the licensee has not relinquished control of its licensed facilities to a third party.
- Is the licensee in charge of employment, supervision, and dismissal of personnel? Retention of control over such personnel matters would tend to support a conclusion that the licensee has not relinquished control to a third party through a management agreement or other arrangement.
- Is the licensee in charge of the payment of financing obligations, including expenses arising out of operation of the licensed facilities? If the licensee has retained responsibility for such expenses, such retention of control will be taken into account in determining whether the licensee has relinquished control of its facilities to a third party.
- Does the licensee receive monies and profits derived from operation of the licensed facilities? Again, the role of the licensee with regard to receipt of profits and other monies is one of the determining factors with regard to whether the licensee has relinquished control of its facilities to a third party through a management agreement or other arrangement.

In this proceeding our purpose is to examine whether management agreements which do *not* involve any relinquishment of control under the *Intermountain* test still should be deemed to confer attributable interests to the managing party under the agreement. We seek comment on this issue.

8. In particular, commenters should address the following questions. First, could management agreements be structured in such a way that the manager's access to the type of information described in the preceding paragraph would not necessarily have any adverse effect on competition? Commenters should address the specific components of such management agreements, and discuss how these components would protect against anti-competitive effects. Commenters also should address whether examination of such management agreements would require an unreasonable expenditure of Commission staff and other resources and whether there are effective alternatives to such a review procedure that would address our concern.

9. Second, should a management agreement be treated as an attributable interest in all cases, including the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, and any overall CMRS spectrum aggregation cap the Commission may establish in this docket? In addressing this question, commenters should explore any factors and considerations that would support a conclusion that treatment of a management agreement as an attributable interest would be necessary or appropriate in certain of these cases, but not in others.

---

[7] We note, of course, that any such agreement conferring *de facto* control would violate Section 310(d) of the Act if the agreement has not been disclosed and approved by the Commission. Issues of *de facto* control will be determined pursuant to existing precedent. *See generally* Intermountain Microwave, 24 RR 983 (1963) (*Intermountain*); Cellular Control Notice, 1 FCC Rcd 3 (1986); News International, PLC, 97 FCC 2d 349 (1984); Loraine Journal v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications," Report No. CL-93-141, Sept. 22, 1993; Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120," Report No. CL-87-1, Oct. 2, 1986.

[8] *See Intermountain*, 2 Rad. Reg. (P&F) at 984.

10. Third, if we conclude that management agreements or similar arrangements should be treated as attributable interests, what administrative rules would be necessary to enforce such a rule? Would reporting requirements be necessary to enable the Commission to record and monitor instances in which CMRS licensees enter into management agreements for the operation of their systems? For example, in the SMR industry, some private radio licensees have entered into agreements that permit a third party manager to use the system's entire capacity.[9] Although we have reclassified interconnected wide area SMRs as CMRS, SMRs licensed as of August 10, 1993 will continue to be regulated as PMRS during the transition period and SMRs that are not interconnected will remain PMRS. We seek comment on how we should treat such arrangements for purposes of attribution.

11. Finally, if we conclude that management agreements or similar arrangements should be treated as attributable interests, how should our rules apply in the case of designated entities? Specifically, we seek comment regarding the following issues: Are there policies or other considerations that would warrant applying management contract attribution rules differently in the case of designated entities? Should management agreements be attributable for purposes of application of the 10 percent cap relating to entrepreneurs' block licenses? Should management contracts affect eligibility for provisions provided for designated entities?

B. Resale

12. Similarly, we request comment on whether any resale agreements should be considered an interest attributable to a reseller in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. The Commission has defined resale as an "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service to the public (with or without 'adding value') for profit."[10] We have required cellular licensees to provide resale, except that a cellular licensee may restrict resale by a facilities-based competitor after the competitor has been licensed for five years.[11] We note that resellers of commercial mobile radio services have been classified as CMRS providers,[12] and they may offer services that compete with other commercial mobile radio services.

13. In most instances, we are not concerned that a reseller could exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided over that spectrum because other resellers could enter into such resale arrangements. Under these circumstances, we see no reason to attribute the spectrum of the underlying service provider to resellers for purposes of spectrum caps. Some parties, however, have expressed concern that resale agreements may be used to circumvent the spectrum caps. In the context of common carrier regulation, it seems unlikely that any resale agreement short of a transfer of control could reduce the quantity of service available to the public. As a result, we currently do not think that resale agreements should be considered attributable interests, but we invite comments from parties that believe there are competitive concerns.

C. Joint Marketing Agreements.

14. We also request comment on whether joint marketing agreements should constitute an attributable interest in the context of a PCS spectrum aggregation cap, PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap. Under a joint marketing agreement, two or more CMRS providers would pool their resources to market their services to consumers. One aspect of this joint venture may be to market the services of various CMRS providers under a common name. We believe that such joint ventures may be beneficial to both licensees and consumers because of the savings that could be realized by pooling resources for advertising and direct sales. These savings could then be passed on to the consumer.

15. The Commission previously examined whether to limit various joint ventures in the context of our broadcast ownership rules.[13] In that context, the Commission examined joint advertising sales, shared technical facilities, and joint programming arrangements (or "time brokerage"). We noted that such joint ventures are not precluded by any Commission rule or policy so long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities.[14] The Commission did not impose any additional restrictions on operational joint venture arrangements, but noted that all broadcast licensees are subject to compliance with the antitrust laws and maintenance of editorial control.[15] The Commission, however, did limit time brokerage arrangements in the same local market so that:[16]

> where an individual or entity owns or has an attributable interest in one or more stations in a market, time brokerage of any other station in that market form more than 15 percent of the brokered station's broadcast hours per week will result in counting the

[9] These agreements are not submitted to the Commission for our review.

[10] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, Report and Order, 60 FCC 2d 261, 271 (1976).

[11] Petitions for Rule Making Concerning Porposed Changes in the Commission's Cellular Resale Policies, CC Docket No. 91-33, Report and Order, 7 FCC Rcd 4006 (1992). In addition, the Commission has recently adopted a Notice of Inquiry requesting comment on whether the Commission should require some or all CMRS providers to allow resale of their services. The Notice also seeks comment on what CMRS providers would constitute facilities-based competitors in the same service area. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providcers, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145 (adopted June 9, 1994).

[12] The Commission has found that mobile resale service is included within the category of mobile service, and thus resale of a CMRS would meet the definition of a CMRS. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1425 (1994) (*CMRS Second Report and Order*), *recon. pending*.

[13] Revision of Radio Rules and Policies, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2784-89 (*Radio Ownership Rules*), *recon.*, 7 FCC Rcd 6387, 6400-02 (1992) (*Reconsideration of Radio Ownership Rules*).

[14] *Radio Ownership Rules*, 7 FCC Rcd at 2784.

[15] *Id.* at 2787.

[16] *Id.* at 2788.

brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules.

16. As explained in *Radio Ownership Rules*, our rules or policies do not prohibit joint marketing ventures so long as a licensee maintains *de facto* control over the licensed facilities and complies with the antitrust laws. In the context of CMRS or PCS joint ventures, we need not concern ourselves with programming diversity because CMRS providers are, by definition, common carriers and have no control over content. We believe that there may be benefits to consumers from these joint marketing ventures. We are concerned, however, that such arrangements may provide competitors access to information, or have other anticompetitive effects, that could impede vigorous competition.[17] Therefore, commenters should address whether a licensee who enters into a joint marketing venture with one or more licensees whose geographic market areas have an overlap of 10 percent of the population should have the interest of the other joint venture licensees attributed to it for purposes of the PCS aggregations limits, the cellular-PCS cross-ownership rules, or a general CMRS spectrum cap. In addition, if the Commission finds such arrangements to be attributable interests, commenters should address whether we should adopt different rules relating to designated entities.[18]

III. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-Restricted Proceeding

17. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

18. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this *Further Notice* on small entities. The IRFA is contained in Appendix A to this *Further Notice*. The Acting Secretary shall cause a copy of this *Further Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Comment Period

19. Interested persons may file comments in this proceeding on or before **August 9, 1994**, and reply comments on or before **August 19, 1994**. For filing requirements, *see generally* 47 CFR §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M St., N.W., Room 644, Washington, DC 20554, and to the Deputy Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M St., N.W., Room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

20. For further information regarding this *Further Notice*, contact Greg Rosston at (202) 418-2030 (Office of Plans and Policy) or Leila Brown at (202) 418-1300 (Common Carrier Bureau, Mobile Services Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Act Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA.

Reason for Action

This rule making proceeding was initiated to seek comment with regard to whether management agreements and resale arrangements should be treated as attributable interests for purposes of application of the Commission's rules relating to (1) the personal communications service (PCS) spectrum aggregation cap; (2) the PCS-cellular cross-ownership restrictions; (3) any overall commercial mobile radio service (CMRS) spectrum aggregation cap the Commission may establish in this docket; and (4) control of a designated entity.

Objectives

The principal objective of the *Further Notice* is to promote vigorous competition in the CMRS marketplace through the development of attribution rules that prevent any CMRS licensee from gaining an unfair competitive advantage.

[17] *See, e.g.*, para. 5, *supra*.

[18] *See* para. 15, *supra*.

Legal Basis

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), and Sections 3(n), 4(i), 303(r), 309, 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 309, 332(c), and 332(d), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements

The proposals under consideration in the *Further Notice* may impose certain new reporting and recordkeeping requirements on mobile services licensees.

Federal Rules Which Overlap, Duplicate, or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Many small entities could be affected by the proposals contained in the *Further Notice*. Depending on the final resolution of the issues, regulations affecting the licensing, recordkeeping, and reporting obligations of numerous mobile services providers may be changed. The full extent of these changes cannot be predicted until various other issues raised in the proceeding (*e.g.*, whether a CMRS spectrum cap will be established by the Commission) have been resolved. After evaluating the comments filed in response to the *Further Notice*, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Further Notice* solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 13 of the *Further Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 94-90

In the Matter of

Eligibility for the Specialized
Mobile Radio Services
and Radio Services in the
220-222 MHz Land Mobile Band
and Use of Radio Dispatch
Communications

NOTICE OF PROPOSED RULE MAKING

Adopted: August 2, 1994; Released: August 11, 1994

Comment Date: September 21, 1994
Reply Comment Date: October 6, 1994

By the Commission:

Table of Contents

	Paragraph
I. Introduction	1
II. Background	
A. The SMR and 220 MHz Services	2-4
B. Wireline Restrictions	5-11
C. Dispatch Prohibition	12
D. Recent Legislative and Regulatory Developments	13-14
III. Discussion	
A. Licensee Eligibility in SMR and 220 MHz Commercial Service	16-28
B. Common Carrier Dispatch Prohibition	29-34

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* , we propose to amend the Commission's rules governing licensee eligibility in the Specialized Mobile Radio (SMR) service and in the commercial 220-222 megahertz (MHz) land mobile services.[1] Currently, Section 90.603(c) of our rules prohibits wireline telephone common carriers that provide local exchange service from holding SMR licenses.[2] Section 90.703(c) extends this same prohibition to the licensing of commercial 220 MHz mobile radio services. In this Notice, we consider whether these restrictions should be eliminated as no longer relevant or necessary given the current state of the commercial mobile services marketplace.[3] We also propose to eliminate our current prohibition on the provision of dispatch service by cellular licensees and other licensees in the Public Mobile Services.[4]

II. BACKGROUND

A. The SMR and 220 MHz Services

2. In 1974, the Commission established the SMR service as a private land mobile radio service in the 800 MHz band, envisioning that SMR systems would primarily provide radio dispatch communications to local customers on a non-interconnected basis.[5] Growth of the service spurred the Commission in 1986 to allocate additional spectrum in the 900 MHz band to the service.[6] The introduction of SMR service also encouraged industry to develop new system designs and technology to maximize use of the frequencies so that operators could serve more customers.[7]

---

[1] 47 C.F.R. §§ 90.603(c), 90.703(c) (1993). *See* Appendix A (proposed rule changes).

[2] Section 22.2 of the Commission's rules defines wireline telephone common carriers as "common carriers . . . in the business of providing landline local exchange telephone service." 47 C.F.R. § 22.2 (1993). For purposes of this *Notice*, therefore, the terms "wireline" and "local exchange carrier" or "LEC" are interchangeable.

[3] The Commission has identified cellular, wide-area SMR, and PCS services as key components of that marketplace. *See* Second Report and Order, GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (*Broadband PCS Second Report and Order*) at para. 18, *recon.* Memorandum Opinion and Order, FCC 94-144 (Released June 13, 1994), 59 Fed. Reg. 32830 (Broadband PCS Reconsideration Order).

[4] 47 C.F.R. §§ 22.519(a), 22.911(d) (1993).

[5] *See* Memorandum Opinion and Order, Docket No. 18262, 51 FCC Rcd 945 (1975) at paras. 43, 67 (*SMR Allocation Reconsideration Order*), *aff'd* NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied* 425 U.S. 992 (1976); Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281 (1982) at para. 12, *mod.* Memorandum Opinion and Order, 95 FCC 2d 477 (1983); D. Fertig, Private Radio Bureau, FCC, "Specialized Mobile Radio" (Mar. 1991), Appendix. While Docket 18262 did not deprive private licensees of the right to interconnect their facilities, restrictions were placed on operations in the 800 MHz band, in particular, that made interconnection arrangements difficult. *See* Further Notice of Proposed Rule Making, Docket No. 20846, 70 FCC 2d 1796, 1797 (1979).

[6] *See* Report and Order, GN Docket No. 84-1233, 2 FCC Rcd 1825, 1828-29 (1986).

[7] For example, SMR service has fueled the development of "trunking" technology. There are two types of SMR frequencies: conventional and trunked. "Trunking" is a technology where multiple channels are centrally controlled so that users are automatically assigned to operate on the first available channel. Sharing multiple channels among many users on an "as available" basis increases the efficiency of these channels more than if they were available separately to individual users. *See SMR Allocation Reconsideration Order*, 51 FCC 2d at 965, 969-970. Subscribers of conventional systems, however, must scan for available channels manually.

Since 1974 the SMR service has experienced rapid growth.[8] In particular, SMR growth has been accompanied by a substantial amount of spectrum consolidation. In recent years, licensees have increasingly expressed an interest in aggregating large channel blocks and using advanced technologies to increase spectrum and serve wide areas efficiently.[9] SMR licensees have also developed innovative, digital applications that allow users nationwide to send both voice and data transmissions. Also, regulatory changes have enabled SMRs to offer services that are interconnected to the public switched network.[10]

3. At present, the 800 MHz SMR service is substantially licensed in most markets.[11] The types of SMR service offerings available in the 800 MHz band range from traditional radio dispatch service for local customers to more sophisticated voice and data transmission service offered on a wide-area basis.[12] 800 MHz SMRs have traditionally been licensed on a station-by-station, channel-by-channel basis, which has been viewed as encumbering the development of wide-area, multi-channel systems in this band. The Commission in recent years, however, has made some accommodation for the licensing of wide-area SMR systems. Generally, we have granted requests to operate wide-area systems only where the proposed systems are in (1) a waiting list area; (2) an area where the frequencies of the SMR stations included in the wide-area SMR system are used so extensively by the applicant that the frequencies could not be used by any other applicant to develop a viable system; or (3) any other area where no additional 800 MHz channels are available.[13] In processing these requests, we consider a single wide-area SMR system to be limited to a geographic area defined by the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation; and (2) currently licensed to or managed by an applicant.[14] We have also permitted applicants for wide-area systems to aggregate their mobiles to satisfy loading requirements.[15] In addition, we have amended our technical rules and lengthened the extended implementation period to facilitate the development of wide-area systems.[16] Comprehensive regulatory treatment of wide-area SMR licensing is being considered in pending rule making proceedings.[17] In most markets, many of the 900 MHz SMR frequencies[18] are still available for licensing, and services offered by existing licensees in this band include the provision of high-speed, digital data transmission.[19] The availability of 900 MHz channels is due to the fact that we have only engaged in limited licensing of this spectrum to date.[20]

4. In 1991, the Commission established the 220 MHz service as part of an effort to reallocate spectrum to accommodate the development of more efficient narrowband radio technologies.[21] The service is licensed in one, five and

---

[8] For example, in a 1986 survey conducted by Radio Communications Report, the largest SMR provider serviced just 3,300 mobiles. In 1994, the largest SMR provider, according to the same survey, serviced 300,000 mobiles. Indeed, in 1994, at least 16 SMR companies now service more than 3,300 mobiles. *Compare* Radio Communications Report , January 15, 1986, at 5 *with* Radio Communications Report, February 14, 1994, at 14 (Survey of RCR's Top SMR Operators). SMR services are projected to reach 4.2 million customers by the year 2000. *See* Cellular Telecommunications Industry Association, *The Changing Wireless Marketplace*, at 8 (Dec. 17, 1992).

[9] *See, e.g.*, G. Naik, "Mobile Radio Companies Heed Call of Cellular Market," *The Wall Street Journal*, Sept. 13, 1993, at B4 (highlighting efforts of Nextel Communications, Inc. to consolidate SMR operations across the country and convert to digital technology in preparation for the offering of "cellular-like" service). The successful development of SMR systems, for example, prompted MCI to make a substantial investment in Nextel Communications, a major SMR provider, as a means of entering the wireless market and positioning the company to better compete with AT&T, which is seeking cellular interests. *See* E. Andrews, "MCI Plans Big Nextel Stake as Move Into Wireless," *N.Y. Times*, Mar. 1, 1994, at D1.

[10] As part of the 1982 amendments to the Communications Act, Congress allowed SMR end users to subscribe to telephone service either directly or through the SMR operator as long as for-profit resale of telephone service did not take place. The Commission subsequently removed the restrictions on SMR interconnection with the public switched telephone network if the service was obtained on a non-profit, cost-shared basis. *See* Second Report and Order, Docket No. 20846, 89 FCC 2d 741, 752-53 (1982), *recon.* Memorandum Opinion and Order, 93 FCC 2d 1111 (1983). We also permitted interconnection of telephone service at a common point at the SMR base station to reduce the cost and complexity of SMRs providing interconnected service. *Id.*

[11] 800 MHz SMRs are licensed in the 806-824 and the 851-869 MHz bands. *See* 47 C.F.R. Part 90, Subpart S.

[12] For example, Nextel Communications has launched a sophisticated network of wide-area 800 MHz operations in Los Angeles, which ultimately will be integrated with other 800 MHz networks in California to provide telephone, private network radio dispatch, paging and messaging services throughout the state. *See* "Nextel Starts Full Commercial Service in Southern California," *PCIA Bulletin*, May 20, 1994, at 10.

[13] Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman, DA 92-1734, 8 FCC Rcd 143 (1993) (*Weisman Letter); see also* Fleet Call, Inc. 6 FCC Rcd 1533 (1991).

[14] *Weisman Letter* at 143.

[15] *Id.* at 144. In so doing, we calculate the loading for the stations that an applicant seeks to combine into a wide-area SMR system by dividing the total number of mobiles/controls associated with those stations by the total number of discrete channels licensed within the "footprint." *Id.*

[16] *See* Report and Order, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993); Report and Order, PR Docket No. 92-210, 8 FCC Rcd 3975 (1993).

[17] *See* Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993) (800 MHz proceeding) and First Report and Order and Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (900 MHz proceeding); Further Notice of Proposed Rule Making, GN Docket No. 93-252, 9 FCC Rcd 2863 (1994) at paras. 29-34 (*CMRS Further Notice*).

[18] The 900 MHz SMR frequencies are located in the 896-901 and the 935-940 MHz bands. *See* 47 C.F.R. Part 90, Subpart S.

[19] For example, RAM Mobile Data has constructed a nationwide mobile data network using SMR frequencies in the 900 MHz band.

[20] We allocated 200 channel pairs in the 900 MHz band for the SMR service in 1986 and established a two-phase process for licensing these channels. Phase I licensing began in 1987 and was completed in 1992 within the 46 "Designated Filing Areas" (DFAs) that represented the top 50 markets in the country. Twenty licenses were authorized within each DFA. *See* Report and Order, GN Docket No. 84-1233, 2 FCC Rcd 1825 (1986). We sought comment on how to implement additional licensing of the service in Phase II. *See* Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989); First Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993).

[21] *See* Report and Order, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991) (*220 MHz Order*), recon. Memorandum Opinion and Order, 7 FCC Rcd 4487 (1992) (*220 MHz Reconsideration Order*).

ten channel blocks on a nationwide and local basis for two-way narrowband use by both commercial and non-commercial operators.[22] Both the nationwide commercial channels and local channels in most major markets have been licensed, although few licensees have as yet completed construction and commenced service.[23]

B. The Wireline Restrictions

5. When the Commission established the SMR service in 1974, it elected to prohibit wireline telephone common carriers from holding SMR base station licenses.[24] As this rule has been interpreted, a wireline telephone common carrier may not be in control of an SMR licensee, whether such control is *de jure* (ownership of 50 percent or more of the company's stock) or *de facto* (control in fact regardless of amount of stock owned).[25] Because of the dominance of the established wireline carriers in the 1970's, the Commission viewed the prohibition on wireline entry as consistent with promoting competition in the fledgling SMR industry.[26] The Commission has also stated that the wireline prohibition was intended to ensure that SMRs would be available as a business opportunity for small entrepreneurs and to reduce incentives for wireline carriers to engage in discriminatory interconnection practices.[27]

6. In conjunction with the establishment of 220 MHz service, the Commission adopted a prohibition on wireline eligibility for commercial licenses identical to the SMR wireline prohibition.[28] Although the Commission did not explain in detail its reasons for applying the wireline ban to commercial 220 MHz licenses, the Commission has stated that the rationale for excluding wirelines from SMR licensing also served as the basis for the 220 MHz limitation.[29]

7. In 1986, the Commission issued a *Notice of Proposed Rule Making* in PR Docket No. 86-3 that proposed to eliminate the SMR wireline restriction.[30] The Commission initiated this docket after receiving several requests from wireline carriers for waiver of Section 90.603(c). The Commission subsequently granted conditional waivers of the restriction to several wireline companies to allow them to acquire SMR stations as part of larger corporate acquisitions.[31]

8. In 1992, the Commission terminated Docket No. 86-3 on the grounds that the record had become stale and stated that the wireline restriction should be retained at least until the Commission could more fully evaluate "the competitive potential of private land mobile services vis-a-vis common carrier land mobile providers" so as "to preserve a climate favorable to the continued development of private land mobile competitors."[32] Additionally, the *Termination Order* terminated all conditional waivers of Section 90.603(c) that had been previously granted, but gave recipients of these waiver grants an opportunity to rejustify their waiver grants.[33]

9. Southwestern Bell Corporation (SBC) and Bell Atlantic Enterprises International, Inc. (Bell Atlantic) sought reconsideration of the Commission's decision to terminate

---

[22] *See* 47 C.F.R. Part 90, Subpart T.

[23] The debut of 220 MHz service has been delayed by litigation, which was recently resolved. *See* "220 MHz Debut Nearing Despite Legal Wrangling," Radio Communications Report, Feb. 28, 1994, at 1. The D.C. Circuit recently dismissed a case which challenged our licensing procedures for the 220 MHz service. *See* Order, *per curiam*, Evans v. FCC, Case No. 92-1317 (D.C. Cir. Mar. 18, 1994). While the suit was pending, we had conditioned all local license grants and extended the construction deadlines until the matter was resolved. *See* Public Notice, Lottery for 220-222 MHz Private Radio Land Mobile "Local" Channels, DA-1231, 57 Fed. Reg. 41935, 41936 (Sept. 14, 1992). The construction deadlines were further extended in an Order dated March 30, 1994. *See* Order, PR Docket No. 89-552, DA 94-276 (Mar. 30, 1994). Local 220 MHz licensees have until Dec. 2, 1994 to construct their facilities and place them in operation.

[24] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752, 787 (1974) (*SMR Allocation Second Report and Order)* (codified at 47 C.F.R. § 90.603(c) (1993)).

[25] *See* Letter from Ralph A. Haller, Chief, Private Radio Bureau, to Henry Goldberg (July 1, 1991). *See also* In re McCaw Cellular Communications Inc., 4 FCC Rcd 3784, 3788-89 (1989) (discussing indicia of control). Non-wireline common carriers are not restricted from being licensed as SMR service providers.

[26] *See SMR Allocation Second Report and Order*, 46 FCC 2d at 760, 767-69 (noting "a general feeling of malaise about letting wireline monopolies expand in the mobile communications market which has been traditionally served primarily by competitive entities"). In addition, one of the two cellular blocks in each market was allocated specifically for use by the local wireline carrier. *Id.* at 761.

[27] *See* Order, PR Docket No. 86-3, 7 FCC Rcd 4398 (1992) (*Termination Order)*.

[28] *See 220 MHz Order*, 6 FCC Rcd 2356 (1991), recon. *220 MHz Reconsideration Order*, 7 FCC Rcd 4487 (1992). *See also* 47 C.F.R. § 90.703(c), which mirrors the language of the SMR wireline restriction. Also of note, in a recent proceeding examining proposals to promote more efficient use of frequency bands allocated to the private land mobile radio services, the Commission similarly proposed restricting wireline eligibility for SMR licenses in the 220-222 MHz, 806-821/851-866 and 896-901/935-940 MHz bands and for the licensing of a potential new service -- Innovative Shared Use Radio Operations. We indicated, however, that we would specifically address the application of wireline eligibility to Innovative Shared Use licensees in a future proceeding covering wireline eligibility in all bands. *See* Notice of Proposed Rule Making, PR Docket No. 92-235, 7 FCC Rcd 8105, 8121, 8159 and 8162 (1992).

[29] *See 220 MHz Reconsideration Order*, 7 FCC Rcd at 4487 ("[T]he genesis of our regulatory scheme for private carriers at 220-222 MHz was inspired by the treatment of Specialized Mobile Radio Service licensees under Subpart S.").

[30] *See* Notice of Proposed Rule Making in PR Docket No. 86-3, FCC 86-2, 51 Fed. Reg. 2910 (1986).

[31] The Commission granted waivers to Pacific Telesis, Inc., Southwestern Bell, Advanced Paging Services, Inc., U.S. West Paging, Inc., and Bell Atlantic Enterprises International, Inc. *See Termination Order*, 7 FCC Rcd at 4399.

[32] *Id.* The Commission used similar reasoning to justify retaining the commercial 220 wireline restriction in 1992. In the *220 MHz Reconsideration Order*, the Commission observed that private carrier land mobile providers were emerging as innovative and viable competitors to common carrier land mobile services. The Commission decided that retaining the wireline ban on commercial 220 licenses would encourage competition until the Commission could "better evaluate the extent to which private land mobile services might prove to be true competitors to cellular and similar technologies." *220 MHz Reconsideration Order*, 7 FCC Rcd at 4488.

[33] *Termination Order*, 7 FCC Rcd at 4399. The *Order* indicated that all conditional waivers would automatically terminate within 90 days of its effective date, unless within 60 days of the effective date recipients of these waivers filed a request demonstrating that continuation of the waiver was in the public interest. We also denied a subsequent request to stay our waiver termination. *See* Order, PR Docket No. 86-3, 7 FCC Rcd 6879 (1992).

Docket No. 86-3.[34] The American Mobile Telecommunications Association (AMTA) filed an opposition to these petitions.[35] In addition, SBC, Bell Atlantic and US West Paging, Inc. (USWP) filed requests to rejustify the waiver grants that had been terminated pursuant to the *Termination Order*.[36] In 1993, we received three additional requests to waive the wireline rule filed by RAM Mobile Data USA Limited (RMD), Cass Cable TV, Inc. (Cass Cable), and American Paging, Inc. (API).[37]

10. On April 12, 1994, we asked for comment on each of the pending requests for waiver of the wireline prohibition.[38] Nineteen entities submitted comments on the waiver requests and five have submitted reply comments. Most commenters support the petitioners' requests for waiver.[39] Many commenters also contend that the wireline prohibition is no longer justified in today's mobile services marketplace and therefore urge the Commission to initiate a new rule making to review the wireline prohibition.[40] Three of the commenters expressed concern about lifting the wireline prohibition, but agreed that the issue should be resolved in a rule making proceeding.[41]

11. The Commission also has before it a petition for rule making filed by Polar Communications Mutual Aid Corporation (Polar).[42] Polar argues that wireline participation in the SMR industry would serve the public interest and that the original reasons for establishment of the restriction are either moot or are being addressed by ongoing Commission efforts to revise mobile services regulation. We hereby incorporate Polar's rule making request into this proceeding.

C. Dispatch Prohibition

12. The Commission currently prohibits common carriers licensed after January 1, 1982, including all cellular licensees, from offering dispatch services.[43] The Commission's dispatch prohibition is derived from a statutory ban adopted as part of the 1982 amendments to the Communications Act, which prohibited common carrier dispatch radio service while also providing that dispatch could be offered without restriction in the private land mobile services.[44] According to the 1982 Conference Report accompanying this legislation, Congress did not want land mobile frequencies allocated for use by common carriers to be devoted to dispatch service to any significant extent.[45] The Commission has since construed the prohibition on dispatch services to include any transmission on cellular frequencies that routes communications through a dispatcher, as opposed to through a cellular switch (i.e., with no intervention by a dispatcher).[46] On the other hand, the Commission has allowed "dispatch-type" communications to be offered through the cellular switched network as long as the communication is not directly between a dispatcher and end users.[47] Presently, in the private land mobile services, most dispatch is provided on an internal, private basis, although dispatch is also available on commercial and shared-use systems.

D. Recent Legislative and Regulatory Developments

---

[34] *See* Bell Atlantic Enterprises International, Inc. Petition for Reconsideration of PR Docket No. 86-3 (filed Aug. 21, 1992); Southwestern Bell Corporation Petition for Reconsideration of PR Docket No. 86-3 (filed Aug. 21, 1992). BellSouth Corporation (BellSouth) filed comments in response to the Petitions for Reconsideration. See Comments of BellSouth On Petitions for Reconsideration (filed Oct. 15, 1992). Southwestern Bell withdrew its Petition on August 3, 1994. Southwestern Bell Notice of Withdrawal of Petition for Reconsideration (filed Aug. 3, 1994). Bell Atlantic withdrew its Petition on August 4, 1994. Bell Atlantic Notice of Dismissal of Petition for Reconsideration (filed Aug. 4, 1994). Also, we note that BellSouth has filed a petition for review of the Commission's *Termination Order* in the United States Court of Appeals for the District of Columbia Circuit. *See* Petition for Review, BellSouth Corporation v. FCC, No. 92-1334 (D.C. Cir. Aug. 3, 1992).

[35] AMTA Opposition to Petition for Reconsideration. PR Docket No. 86-3 (filed September 3, 1992). Telephone and Data Systems, Inc. (TDS) filed reply comments in response to AMTA's Opposition. *See* Reply Comments of TDS, Inc., PR Docket No. 86-3 (filed October 26, 1992).

[36] *See* SBC Request for Permanent Waiver, PR Docket No. 86-3 (filed Sept. 18, 1992); Bell Atlantic Request for Rule Waiver (filed Oct. 14, 1992); USWP Request for Permanent Waiver, PR Docket No. 86-3 (filed Oct. 20, 1992). PacTel Paging and PacTel Paging of California requested a temporary extension of Section 90.603(c), which was granted in order to facilitate divestiture of facilities. *See* PacTel Request for Temporary Waiver (filed Oct. 19, 1992).

[37] *See* RMD Request for Transfer of Control and Rule Waiver (filed Sept. 22, 1993); Cass Cable Request for Rule Waiver (filed Nov. 8, 1993); API Request for Rule Waiver (filed Nov. 24, 1993).

[38] FCC Public Notice No. DA 94-329 (Apr. 12, 1994).

[39] *See, e.g.*, Dial Page, Inc. Comments (filed May 20, 1994) at 3, National Telephone Cooperative Association Comments (filed May 20, 1994) at 2, American Mobile Telecommunications Association, Inc. Comments (filed May 20, 1994) at 1 (supporting the requests, but conditioning Cass Cable and API requests on outcome of rulemaking), Poka-Lambro Telephone Cooperative, Inc. Comments (filed May 20, 1994) at 2 (supporting the requests, but conditioning RAM and API requests on outcome of rulemaking).

[40] *See, e.g.*, Chariton Valley Telephone Corporation Comments (filed May 20, 1994) at 5-6, National Telephone Cooperative Association Comments (filed May 20, 1994) at 2-3, Joint Comments of Pacific Bell and Nevada Bell (filed May 20, 1994) at 2-3.

[41] Comments of Audio-Video Corporation 1-2 (filed May 23, 1994); Comments of Cellular Information Systems, Inc. 6-9 (filed May 20, 1994); Joint Comments of the Industrial Telecommunications Association, Inc. and Council of Independent Communication Suppliers (filed May 20, 1994).

[42] Polar Communications Mutual Aid Corporation Petition for Rule Making (filed Nov. 23, 1993).

[43] 47 C.F.R. § § 22.519(a), 22.911(d) (1993).

[44] *See* 47 U.S.C. § 332 (c)(2) (1982). *See also* H.R. Rep. No. 765, 97th Cong., 2d Sess. 55-56 (1982). A Commission prohibition against cellular carriers engaging in fleet dispatch services predated the 1982 statutory ban on dispatch services. *See SMR Allocation Second Report and Order*, 46 FCC 2d at 761.

[45] Some common carrier dispatch is available because Congress provided that licensees offering dispatch prior to January 1, 1982 could continue to do so under the statute. Accordingly, our rules provide for this limited amount of common carrier dispatch. *See, e.g.*, 47 C.F.R. § 22.519(a) (1993).

[46] *See* Report and Order, GN Docket No. 87-390, 3 FCC Rcd 7033, 7042-43 (1988), recon. Memorandum Opinion and Order, 5 FCC Rcd 1138 (1990).

[47] *Id.* We define dispatch service under our rules as "[t]wo-way voice communications, normally of not more than one minute in duration that is transmitted between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities." 47 C.F.R. § 22.2 (1993).

13. In the 1993 Omnibus Budget Reconciliation Act (Budget Act), Congress amended the Communications Act to create a new comprehensive framework for the regulation of all mobile radio/services.[48] One of the consequences of this legislation is that the traditional distinction between private and common carrier services that constituted one of the underpinnings of the wireline prohibition has been significantly altered. Section 332 of the Communications Act, as amended by the Budget Act, divides all mobile services into two categories, commercial mobile radio service (CMRS) and private mobile radio service (PMRS). In our *CMRS Second Report and Order*, we concluded that under Section 332, certain private mobile radio service providers, including SMR and commercial 220 MHz licensees, would be subject to reclassification as CMRS if they provide "interconnected service."[49] The statute further provides that as CMRS providers, these licensees are to be regulated as common carriers, although the Commission has authority to forbear from enforcing certain provisions of Title II of the Communications Act with respect to CMRS.[50]

14. Also in the Budget Act, Congress has amended the ban on common carrier dispatch service in former Section 332 of the Communications Act. Although Congress left the ban in place, it granted the Commission authority to repeal the ban in whole or in part.[51] In GN Docket No. 93-252, we sought comment on a proposal to eliminate the prohibition, but concluded that the record "has not provided us with sufficient data to sustain an informed judgment regarding the effects that removal of the dispatch service ban may have in the dispatch marketplace."[52] In particular, we noted that while most commenters favored eliminating the dispatch prohibition, some commenters argued that repeal of the ban would enable Part 22 licensees with more spectrum and greater resources than traditional SMR licensees to exercise market power over SMR providers primarily offering dispatch.[53] Accordingly, we stated that we would seek further comment on the issue.[54]

III. DISCUSSION

15. The mobile services marketplace has changed dramatically in the twenty years since the SMR/wireline prohibition was adopted, and the pace of change is now accelerating. We believe that our eligibility requirements for SMR and commercial 220 MHz services should accurately reflect the current state of competition in the mobile services arena. Given the dynamic changes occurring in the marketplace, we tentatively conclude that our wireline restrictions no longer serve a useful purpose and therefore should be eliminated. Also, in light of recent competitive and regulatory developments, we tentatively conclude that the present prohibition against common carrier dispatch service should be modified or eliminated. We seek comment on these proposals, and particularly request commenters to address the prospective impact of these proposed changes on mobile services competition.

A. Licensee Eligibility in SMR and 220 MHz Commercial Service

16. In evaluating our present wireline restrictions, we tentatively conclude that there is no longer a need for the SMR wireline ban or the commercial 220 MHz wireline restriction in today's competitive mobile service marketplace.[55] We reach this tentative conclusion for several reasons. First, we believe that the risk of wireline carriers being able to cause competitive harm if allowed to enter the SMR market has diminished in recent years. When the SMR wireline ban was adopted 20 years ago, mobile services were in their infancy and telecommunications was dominated by wireline carriers under the control of AT&T. Since that time, the breakup of AT&T and the rapid growth of mobile services have combined to create an environment in which wireline carrier participation in mobile services, including participation by the post-divestiture Bell Operating Companies (BOCs), has the potential to increase competition rather than impede it.

17. We have recently recognized the evolving role of wireline carriers in the mobile services arena in our Broadband PCS docket, in which we concluded that wireline entities should be allowed to hold broadband PCS licenses without restriction (except to the extent such entities also hold attributable cellular interests). In that proceeding, we concluded that allowing local exchange carriers (LECs) to participate in broadband PCS would produce significant economies of scope between wireline and PCS networks, which, in turn, would promote rapid development of PCS and yield a broader array of PCS services at lower costs to consumers.[56] We have similarly concluded that LECs should be allowed to participate in the provision of narrowband PCS service without restriction.[57] We believe that our conclusions with respect to wireline entry into broadband and narrowband PCS are also potentially applicable to SMR and 220 MHz commercial service.

18. In addition to perceiving potential benefits from allowing wireline entry into SMR and 220 MHz service, we question whether the wireline restriction continues to be necessary to protect against competitive harm. The wireline restrictions have served to eliminate any incentive for LECs to (1) discriminate in the offering of interconnection to non-affiliated SMR licensees, or (2) use their market power in the local exchange market to cross-subsidize SMR services, thereby undercutting potential competition. Even if the wireline prohibition is eliminated, however, other

---

[48] *See* Pub. L. No. 103-66, Title VI, 6002(b)(2)(A), (B), 107 Stat. 312, 392 (1993).

[49] Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 at paras. 90, 95 (1994) (*CMRS Second Report and Order*).

[50] 47 U.S.C. § 332(c)(1)(A); H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 491 (1993).

[51] *Compare* former 47 U.S.C. § 332(c)(2) (1982) with 47 U.S.C. § 332(c)(2) (1993).

[52] *See CMRS Second Report and Order*, 9 FCC Rcd 1411 at para. 105.

[53] *Id.* at para. 104 and nn.212-13.

[54] *See Id.* at para. 105.

[55] *See* discussion *supra* at para. 5 (discussing bases for wireline restrictions).

[56] *See Broadband PCS Second Report and Order* at para. 126, *recon. Broadband PCS Reconsideration Order*. The Commission also opted to refrain from imposing any new separate subsidiary requirements on LECs -- including BOCs -- seeking to participate in the PCS market. *See* discussion *infra* at para. 28.

[57] First Report and Order, GN Docket No. 90-314, 8 FCC Rcd 7162, 7167 (1993) (*Narrowband PCS First Report and Order*), *recon.* Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994).

regulatory safeguards exist and can be enforced to prevent wireline carriers from engaging in these forms of anti-competitive behavior.

19. With respect to discrimination in interconnection, Section 201 of the Communications Act mandates that a carrier must provide reasonable interconnection to any carrier that requests it. In addition, Section 332(c)(1)(B) of the Communications Act, as amended by the Budget Act, requires the Commission pursuant to Section 201 to order common carriers to interconnect with CMRS providers (which includes any SMR or commercial 220 MHz licensee utilizing interconnection) on reasonable request.[58] In our Order implementing this provision, we determined that LECs should provide reasonable interconnection to all CMRS providers in a manner that is consistent with our past requirements for cellular providers.[59] In addition, we have reaffirmed our authority under Sections 201 and 202 of the Communications Act to require LECs to offer interconnection to PMRS providers.[60] We believe that these safeguards should be sufficient to protect against unreasonable discrimination by LECs in the event that we allow wireline entry into the SMR market.

20. We also note that independent accounting safeguards exist to protect against cross-subsidization in the event of wireline entry into the SMR service. In the CMRS docket, we indicated that our joint cost and affiliate transactions rules would apply to all CMRS providers with LEC affiliates.[61] These rules require LECs[62] to maintain procedures to separate the costs of the regulated activities from those of their activities that are classified as nonregulated for federal accounting purposes,[63] and to account for their transactions with their nonregulated affiliates in accordance with specified valuation methodologies.[64] Since most SMRs and commercial 220 MHz licensees fall inside the CMRS definition (and are not rate-regulated), these existing and applicable accounting rules should help prevent cross-subsidization .

21. Another reason for eliminating the wireline prohibition, in our view, is that the SMR industry is sufficiently well-established that wireline entry is unlikely to chill further development of the service.[65] Although SMR operations today are still relatively small in comparison to cellular operations, most available SMR spectrum has been licensed in metropolitan areas.[66] Thus, any threat that wirelines might obtain a substantial portion of SMR spectrum and thereby hinder the development of SMR service by non-wireline carriers is substantially diminished. As a practical matter, wirelines are likely to be largely limited to entering the SMR business by acquiring existing SMR businesses, and all such transfers would be subject to Commission review under our existing transfer of control and assignment of license rules.

22. We reach a similar tentative conclusion with respect to wireline participation in commercial 220 MHz service. Although 220 MHz service was established more recently than SMR, substantial licensing has occurred and we have closed the service to new applicants for the time being. Thus, wireline entry into commercial 220 MHz service would be likely to be gradual as the service develops, and would be subject to case-by-case review by the Commission. In addition, a more open eligibility policy may be suitable because of the narrowband nature of 220 MHz service. In establishing regulations for the licensing of narrowband PCS, for example, the Commission concluded that LECs should be allowed to participate in the provision of narrowband PCS service without restriction.[67] The Commission reasoned that narrowband PCS was sufficiently disparate from any LEC offering to make negligible any ability these carriers might have to exert undue market power or restrain trade.[68] We seek comment on whether a similar conclusion is justified in the case of 220 MHz service.

23. Additionally, we observe that repeal of the wireline ban could promote opportunities for additional entry of small entrepreneurs. Polar suggests that the overwhelming majority of companies shut out of the SMR business by the

---

[58] *See* Communications Act, 47 U.S.C. § 332(c)(1)(B).

[59] See *CMRS Second Report and Order*, 9 FCC Rcd 1411 at paras. 227-39. Past FCC policies have established that telephone companies must offer unaffiliated cellular operators, at a minimum, a form of interconnection no less favorable than that furnished to their own cellular affiliate, or satisfy any other form of reasonable interconnection arrangement requested by a unaffiliated cellular service provider. Telephone companies must also engage in good faith negotiations of interconnection agreements with cellular carriers. *See* Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Declaratory Ruling), 2 FCC Rcd 2910, 2912-13 (1987), recon. Memorandum Opinion and Order, 4 FCC Rcd 2369 (1989).

[60] *See CMRS Second Report and Order*, 9 FCC Rcd 1411 at para. 239. *See also* Amendment of Part 20, 59 Fed. Reg. 18493 (1994) (to be codified at 47 C.F.R. § 20.11). With respect to private mobile service licensees, it is generally well settled that the Commission has authority to require common carriers to provide interconnection to private entities as part of its jurisdiction to regulate interstate common carrier service. See, e.g., Pub. Util. Comm'n of Texas v. FCC, 886 F.2d 1325, 1327-35 (D.C. Cir. 1989)(upholding FCC preemption of state regulation of intrastate interconnection of private microwave licensee and noting assumption that "creation of an interconnection right for wholly *inter* state carriage is securely within the FCC's authority")(emphasis in original); Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 92 (4th Cir. 1983) (recognizing "right of a customer to interconnect his equipment with the interstate telephone network").

[61] *See CMRS Second Report and Order*, 9 FCC Rcd 1411, at para 218. *See also* Part 32 and Part 64 of the Commission's Rules, 47 C.F.R. Parts 32, 64.

[62] These rules do not apply to carriers that employ average schedules in lieu of determining their costs. 47 C.F.R. § 64.902 (1993).

[63] *See* 47 C.F.R. § 64.901 (1993). Section 32.23 of our Rules, 47 C.F.R. § 32.23, defines the circumstances under which LEC activities are classified as nonregulated for federal accounting purposes. This nonregulated category includes activities, such as SMR services, that have never been subject to rate regulation.

[64] *See* 47 C.F.R. §§ 32.27, 64.902 (1993).

[65] *See* discussion *supra* at paras. 2-3 and note 8.

[66] *See, e.g.*, S. Malgieri, "SMRs Becoming Hot Investment in 1990's Wireless Technology," Radio Communications Report, Sept. 13, 1993 at 21.

[67] *Narrowband PCS First Report and Order*, 8 FCC Rcd at 7167; *recon.* Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994).

[68] *See id.* at para. 31. The Commission reached the same conclusion with respect to cellular entry into narrowband PCS, citing the difference between cellular and narrowband PCS service offerings. We defer the question of cellular entry into 220 MHz service, however, pending resolution of the CMRS "spectrum cap" issue in GN Docket No. 93-252. *See* para. 29, *infra*.

wireline ban are small, rural telephone companies with capitalizations that are small in comparison to many dominant SMR operators.[69] Repeal of the ban could therefore serve to further competition in the SMR market by increasing the number of small business participants in the service. We also observe that future auctions of SMR spectrum could provide additional opportunities for small business entry into SMRs through competitive bidding incentives established for small businesses, minorities and rural telephone companies.[70]

24. In addition, wireline entry could infuse new capital and expertise into the mobile services marketplace. The SMR industry is in transition, evolving from stand-alone analog to wide-area networks. 220 MHz service is also in at an important stage of technological development. During this time frame, wirelines can be a key source of capital and expertise for the development of new technological advances that will benefit these services.[71]

25. In sum, we believe our wireline restrictions have been outmoded by changes in the mobile services marketplace since 1974. We are therefore satisfied that there may be cause to eliminate these restrictions. Commenters are nevertheless invited to explore the issues raised by our discussion above and to present any views that justify retaining our wireline restrictions. In particular, we are interested in any concerns commenters may have about the potential ability of wirelines to unfairly influence competition in the mobile services marketplace. In addition, while we believe that repeal of the wireline restrictions is equally justified for both SMR and commercial 220 MHz services, commenters may wish to address the alternative of retaining the restrictions for one service and not the other. Moreover, while our discussion has identified ways in which small entrepreneurs could benefit from lifting the restriction, we also ask for comment on whether wireline entry could hasten the trend toward the acquisition of SMRs by larger entities.

26. In proposing to allow wirelines to enter the SMR and commercial 220 MHz markets, we emphasize our intent to vigorously enforce statutory and regulatory safeguards discussed above that prohibit wirelines from engaging in discriminatory interconnection practices.[72] We encourage commenters to address how we can best achieve this objective.

27. Also, assuming we allow wireline entry into SMR and 220 MHz services, we seek comment on whether existing accounting safeguards applicable to LECs with CMRS operations are sufficient to protect against cross-subsidization and discriminatory pricing, or whether we should also impose structural separation requirements on wireline carriers seeking to offer SMR or commercial 220 MHz services.[73] Our existing accounting safeguards are designed to ensure that wireline ratepayers do not bear the costs of LEC ventures into businesses that are not subject to rate regulation. We therefore have rules in place that classify non-rate regulated services as nonregulated activities for federal accounting purposes, and that govern how LECs apportion their costs between regulated and nonregulated activities.[74] We also have accounting rules that govern how LECs account for their transactions with their nonregulated affiliates.[75] We observe that in the *Broadband PCS Second Report and Order*, we confirmed that these accounting safeguards would apply to PCS, but concluded that no new separate subsidiary requirements should be imposed on LECs (including BOCs) that provide PCS service. We determined that added structural separations requirements would seriously undermine the ability of LECs to take advantage of their potential economies of scope and would jeopardize other public interest benefits of wireline participation in PCS.[76] We therefore seek comment on whether added structural separation requirements would similarly undermine the potential public interest benefits of wireline entry into the SMR and commercial 220 MHz markets.

28. Finally, assuming that we eliminate the wireline restriction, the issue arises whether there is a need to impose other eligibility restrictions on SMR and commercial 220 MHz applicants to address present day competitive concerns. In particular, we have recognized in other contexts that we cannot yet determine that cellular licensees lack market power in the mobile services market.[77] At this time, we will defer consideration of whether this market power is sufficient to justify restrictions on cellular eligibility for SMR or 220 MHz licensing pending a decision in

---

[69] *See* Polar Communications Mutual Aid Corporation, Petition for Rule Making (filed Nov. 23, 1993) at 6.

[70] *See* Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994), at paras. 267-282.

[71] For example, RAM Mobile Data (RMD) presently operates an innovative wireless data network that relies on the limited participation of wireline carrier BellSouth Enterprises, Inc. (BSE) in the venture. The alliance between RMD and BSE does not violate the wireline prohibition because BSE has only a minority non-controlling interest in the RMD enterprise.

[72] *See* Communications Act, 47 U.S.C. §§ 201, 202, 332. We also note that we are unaware of any pending complaints alleging discriminatory interconnection filed by unaffiliated cellular entities against wireline carriers with cellular affiliates.

[73] We note that structural separation requirements are imposed on certain dominant telephone carriers (*i.e.*, BOCs) that provide cellular service. 47 C.F.R. § 22.901(b) (1993).

[74] *See* 47 C.F.R. §§ 32.23, 64.901 (1993).

[75] *See* 47 C.F.R. §§ 32.27, 64.902 (1993). We note that we recently proposed to strengthen our affiliate transactions rules for telephone companies. Notice of Proposed Rule Making, CC Docket No. 93-251, 8 FCC Rcd 8071 (1993). Any rule amendments we adopt in that docket would, of course, apply to transactions between LECs and their SMR affiliates.

[76] *Broadband PCS Second Report and Order*, 8 FCC Rcd 7700 at para. 126. We recently declined to impose added structural safeguards for landline telephone carriers with CMRS affiliates when the issue was presented to us in Gen. Docket No. 93-252. We did commit, however, to exploring the subject in a separate proceeding. *See CMRS Second Report and Order*, 9 FCC Rcd 1411 at paras. 218-19; see also Report and Order, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991), *recon. pending, review pending (Computer III Remand Proceeding)*; Memorandum Opinion and Order, CC Docket No. 90-623, 9 FCC Rcd 3195 (1994).

[77] In the *Broadband PCS Order* and again in our recent Broadband PCS Reconsideration Order, we determined that cellular operators, unlike other mobile services providers, may have the incentive and the potential to exercise market power to subvert PCS competition within their service areas. To ensure a competitive PCS market, therefore, we concluded that some constraints on cellular ownership of PCS systems were necessary within each cellular licensee's service area . *Broadband PCS Second Report and Order*, supra , at paras. 104-108, *recon. Broadband PCS Reconsideration Order* at para. 79.

General Docket 93-252 on our proposal to impose a general limit on the amount of spectrum that any CMRS licensee may acquire in a given geographic market.[78]

B. Common Carrier Dispatch Prohibition

29. Congress has given the Commission the discretion to terminate the prohibition on common carrier dispatch service in whole or in part.[79] In light of this authority and our desire to maintain robust competition in all sectors of the mobile service marketplace, we believe there is a need to reevaluate this prohibition in the context of the new regulatory framework created by the amendments to Sections 332 and 3(n) of the Communications Act. Also, while we have solicited comment on this issue once before recently, we believe we need additional and more specific information than was previously offered to make our decision.[80]

30. We propose to amend our rules to permit all mobile service common carriers to provide dispatch service. A number of parties have indicated to us in the past that repeal of the dispatch ban would enhance competition in the dispatch market and thereby provide consumers with expanded choice and lower prices. We tentatively agree with these views and therefore are inclined to repeal the present prohibition entirely. We ask commenters to address our tentative conclusion that repeal of the dispatch ban will lead to more innovative service offerings and lower costs for dispatch customers. We also seek comment on whether repeal of the ban will increase opportunities for dispatch customers to obtain service from commercial vendors as an alternative to relying on internal systems or systems shared with other eligible users. Commenters are also asked to consider whether repeal of the dispatch prohibition will have differing competitive implications in rural areas, where common carrier mobile operators are more likely to have substantial capacity available for dispatch.

31. While we regard the dispatch prohibition as outdated in the current regulatory and competitive environment, we are aware of SMR industry concerns regarding the role that CMRS providers with greater amounts of spectrum than traditional SMR licensees might play in the dispatch market. We encourage commenters to provide data on the current state of competition in the dispatch market, including the level of participation by small businesses. We also ask commenters to address the potential for participation in the dispatch market by mobile service common carriers. For example, we seek comment on the types of dispatch services that common carrier licensees are most likely to offer, and whether there are any technical advantages or disadvantages to offering dispatch service on a common carrier mobile service system. Next, we request comment on the effect of common carrier entry on competition in the dispatch market, including, in particular, the effect of cellular providers entering the dispatch market. Commenters should further consider whether common carriers operating in the dispatch market could engage in discriminatory pricing or cross-subsidization activities that would place dispatch competitors at a disadvantage.

32. If we conclude that immediate lifting of the dispatch prohibition could have an anti-competitive impact, one alternative would be to "sunset" the rule at some point in the future. For example, we could delay repeal of the rule until August 10, 1996, three years from the date the Budget Act amendments became law. This effective date would coincide with the conclusion of the three year transition period provided in the Budget Act for existing private land mobile licensees to adjust to regulation as CMRS providers.[81] A sunset provision would also effectively defer common carrier mobile service (*e.g.*, cellular service) participation in the dispatch market and thereby give the Commission more time to evaluate information concerning the state of competition in the dispatch market. We seek comment on this alternative.

33. Another alternative to outright repeal of the ban on common carrier dispatch service would be to allow mobile common carrier licensees to provide dispatch service only on a secondary basis or to impose a limit on the amount of system capacity that common carrier licensees may devote to dispatch service.[82] Consumers appear to identify cellular as primarily a two-way voice service, therefore cellular providers may in any case be reluctant to divert system capacity from voice to dispatch service. On the other hand, if dispatch evolves from a primarily analog service to a primarily digital service, cellular licensees may have ample capacity to provide both radiotelephone and dispatch. Also, the introduction of broadband PCS could provide competitive incentives for cellular operators to preserve primary voice service without the need for restrictions. In light of these factors, we seek comment on whether imposing limits on cellular dispatch is necessary or practical.

34. Finally, we ask commenters to consider the treatment of dispatch offered by common carriers other than land mobile service providers, *e.g.* aviation, marine, and mobile satellite licensees who provide common carrier service. In this regard, we note that these categories of common carriers were not previously prohibited from offering dispatch service under old Section 332 of the Communications Act, which applied only to land mobile services.[83] Because

---

[78] *CMRS Further Notice*, 9 FCC Rcd 2863 at paras. 86-105. In that proceeding, the Commission is also deciding the technical, operational and licensing rules that should apply to CMRS licensees. *Id.* at paras. 5-85, 106-155.

[79] *Compare* 47 U.S.C. § 332(c)(2)(1982) *with* 47 U.S.C. § 332(c)(2) (1993).

[80] *See CMRS Second Report and Order*, 9 FCC Rcd 1411 at para. 105.

[81] Pub. L. No. 103-66, Title VI, § 6002(c)(2)(B) (1993); *see CMRS Second Report and Order*, 9 FCC Rcd 1411, at para. 278.

[82] Under our existing rules, cellular providers can offer non-common carrier services on a "secondary basis," which means they can only offer such services if the non-common carrier service will not interfere with the operator's ability to offer cellular service. Thus, a cellular operator can only offer non-common carrier service if there is available capacity on its system. *See* Report and Order, GN Docket No. 87-390, 3 FCC Rcd 7033 (Released Dec. 12, 1988).

[83] Since the prior version of Section 332 applied only to private land mobile services, the ban on dispatch did not apply to satellite mobile service providers that were common carriers. *See* 47 U.S.C. § 332 (1982) amended by 47 U.S.C. § 332 (1993). At least one commenter in Gen. Docket No. 93-252 has raised a concern about amended Section 332, which now applies to *all* mobile service providers, precluding satellite mobile service providers from offering dispatch service. See, e.g., Comments of AMSC Subsidiary Corporation, GN Docket No. 93-252 (filed Nov. 8, 1993) at 6-7. We determined that the *CMRS Second Report and Order* would not alter AMSC's current authorization to provide service. *CMRS Second Report and Order*, 9 FCC

Section 332 as amended applies to all mobile services, however, an issue arises whether these categories of licensees now fall within the scope of the prohibition absent further Commission action. We believe that Congress did not intend to extend the dispatch ban to other than land mobile licensees (such as satellite licensees) when it amended Section 332 in 1993. Indeed, we believe Congress meant simply to repeat and incorporate its old prohibition against common carrier land mobile service providers offering dispatch without modification and to give the Commission authority to repeal the prohibition in whole or in part. We seek comment on this view.

IV. PROCEDURAL MATTERS

35. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the rule changes proposed in this *Notice* on small entities. The IRFA is contained in Appendix B to this Notice . The Secretary shall cause a copy of this *Notice* , including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

36. *Ex Parte Rules/ Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.120 (a).

37. *Comment Period.* Interested persons may file comments in this proceeding on or before **September 21, 1994,** and reply comments on or before **October 6, 1994.** For filing requirements, see generally 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M Street, N.W., Room 5202, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

38. For further information regarding this *Notice* , contact Kathleen O'Brien Ham or Sue McNeil at (202) 634-2443 (Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau), or Myron Peck at (202) 418-1310 (Mobile Services Division, Common Carrier Bureau).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Rcd 1411 at para. 105. *See also* Petition of Waterway Communications System, Inc. for clarification and/or Partial Reconsideration, GN Docket No. 93-252 (May 19, 1994).

Appendix A

Proposed Rule Changes

Parts 22 and 90 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

Part 22 -- Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 307, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307 and 332, unless otherwise noted.

2. Section 22.519 is amended by revising paragraph (a) to read as follows:

§ 22.519 -- Dispatch Stations

(a) Dispatch communications are permitted on public land mobile frequencies.

*****

3. Section 22.911 is amended by revising paragraph (d) to read as follows:

§ 22.911 Permissible Communications.

*****

(d) General and dispatch communications are permitted on cellular frequencies.

*****

Part 90 -- Private Land Mobile Radio Services

4. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

5. 47 C.F.R. § 90.603 is amended by deleting paragraph (c).

*****

6. 47 C.F.R. § 90.703 is amended by deleting paragraph (c).

Appendix B

Initial Regulatory Flexibility Analysis

Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the proposed rule changes on small entities. Written public comments are requested on the IRFA.

I. *Reason for Action*. This rule making proceeding was initiated to solicit comment on proposals to amend Sections 90.603(c), 90.703, 22.519(a) and 22.911(d) of the Commission's rules. The basic proposals are (1) repeal the ban on wireline telephone carrier eligibility for Specialized Mobile Radio Service (SMR) and commercial 220-222 MHz (commercial 220 MHz) land mobile service and (2) permit all commercial mobile service providers to offer dispatch service in competition with SMR systems.

II. *Objectives*. In making the above proposals, the Commission intends to promote competition, growth and innovation at a time when the mobile services marketplace is undergoing regulatory changes.

III. *Legal Basis*. The proposed action is authorized under Sections 3(n), 4(i), 303(r), 332(c) and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 332(c) and 332(d), as amended.

IV. *Reporting, Recordkeeping and Other Compliance Requirements*. None.

V. *Federal Rules Which Overlap, Duplicate or Conflict With Rules*. None.

VI. *Description, Potential Impact, and Number of Small Entities Involved*. Many small entities could be affected by the proposals contained in the *Notice* . The full extent of the impact cannot be predicted until the issues presented in this proceeding are resolved. The Commission will evaluate comments in response to the *Notice* and will set forth its findings on the impact of the rule changes on small entities in the Final Regulatory Flexibility Analysis.

VII. *Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives*. The *Notice* solicits comments on the alternative described above. Any additional significant alternatives presented in the comments will also be considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-265

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1994; Released: August 5, 1994

By the Commission:

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] The 1992 Cable Act amended the Communications Act of 1934, in part, by adding new Sections 616 and 628. Section 616 governs agreements between cable operators -- or other multichannel video programming distributors ("MVPDs") -- and the programming services they distribute, and directs the Commission to establish regulations that prevent cable operators or other MVPDs from entering into carriage agreements that condition carriage of a vendor's programming on particular concessions.[2] Pursuant to that mandate, on September 23, 1993 the Commission adopted general rules consistent with the statute's specific prohibitions in its Second Report and Order in MM Docket No. 92- 265 ("*Second R&O*").[3]

2. On December 15, 1993, the Wireless Cable Association International, Inc. ("WCA") filed a petition for partial reconsideration of the Second R&O. The petition requested that the Commission amend the rules adopted therein to afford standing specifically to any MVPD aggrieved by an alleged violation of Section 616 of the 1992 Cable Act to file a complaint under Section 76.1302(a) of the Commission's rules.[4] WCA's petition was supported by Liberty Cable Company ("Liberty Cable") and GTE Service Corporation ("GTE"), and was opposed by Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty Media").

3. In this *Memorandum Opinion and Order*, we address WCA's petition, the supporting comments, and the oppositions thereto, regarding the scope of standing for complaints filed under Section 616 of the 1992 Cable Act. For the reasons stated below, the Commission finds that it is in the public interest, and consistent with the Communications Act of 1934, to amend Section 76.1302 to afford standing to file a complaint to any MVPD aggrieved by a violation of Section 616. Moreover, we conclude that our regulations proscribing the filing of frivolous complaints[5] are adequate to address any concerns regarding potential abuses of the Commission's complaint process caused by expanding the class of complainants under Section 616.

II. BACKGROUND

4. The 1992 Cable Act and its legislative history[6] indicate that Congress found that the cable television industry is highly concentrated. Congress concluded that excessive concentration could inhibit the entry of new programmers into the cable industry, thereby reducing the number of media voices available to consumers.[7] Congress also found that the cable industry had become vertically integrated in that cable systems and programmers are often commonly owned.[8] When drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry had created an imbalance of power between cable operators and program vendors. Congress concluded, among other things, that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.[9] Thus, cable operators or programmers which compete with the vertically integrated entities may suffer harm to the extent that they do not receive the same favorable terms and conditions of carriage.[10] Congress also found that, in return for carriage on the cable system, some cable operators have required certain non-affiliated programmers to grant them exclusive rights to programming, a financial interest in the programming, or some other consideration.[11]

5. Congress sought to address these concerns by including Sections 19 and 12 in the 1992 Cable Act, which added Sections 628 and 616, respectively, to the Communications Act of 1934. Section 628 (containing the program access provisions) primarily restricts the activities of vertically

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] Id. Section 616 specifically prohibits a multichannel video programming distributor from requiring a financial interest in the programming services as a condition of carriage; coercing a programming vendor to provide exclusive rights as a condition of carriage; retaliating against the vendor for failure to grant exclusivity; and discrimination in carriage terms between affiliated and nonaffiliated programmers.

[3] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992--Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (Oct. 22, 1993), 9 FCC Rcd 2642 (1993).

[4] 47 C.F.R. § 76.1302(a).

[5] 47 C.F.R. § 76.1302(q).

[6] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report"); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 , 102d Cong., 1st. Sess. (1991) ("Senate Report"); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 , 102d Cong., 2d Sess. (1992), reprinted in Cong. Rec. H8308 (Sept. 14, 1992) ("Conference Report").

[7] 1992 Cable Act, § 2(a)(4).

[8] Senate Report at 25.

[9] Senate Report at 24; House Report at 41-45.

[10] 1992 Cable Act, § 2(a)(5).

[11] Senate Report at 24; House Report at 42.

integrated programming vendors and cable operators with respect to other, unaffiliated MVPDs.[12] In contrast, Section 616 was designed to restrict thep activities of cable operators and other MVPDs when dealing with unaffiliated programming vendors.

6. We note that, while these sections proscribe certain anticompetitive conduct, Congress also intended to preserve the legitimate aspects of negotiations for multichannel video programming that result in greater availability of programming in the multichannel video marketplace.[13] Indeed, the statute contained the specific directive to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.[14]

7. Thus, in implementing the provisions of Section 616, the Commission sought to strike a balance that not only proscribed the behavior prohibited by the specific language of the statute, but also preserved the ability of affected parties to engage in legitimate negotiations.[15] We stated that this flexible approach was consistent with our objective of serving:

> the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.[16]

In addition, we observed that:

> the flexibility inherent in this approach will be important in our overall effort to resolve both carriage agreement and program access complaints, so that our implementing rules for Section 616 do not preclude as coercion any mutually acceptable arrangements that would otherwise comply with the program access provisions of Section 628.[17]

8. WCA, Liberty Cable and GTE contend that Section 76.1302 of our Rules is too narrowly drafted because it does not specifically afford standing to file a complaint to any MVPD aggrieved by a violation of Section 616. Petitioners urge the Commission to amend the scope of Section 76.1302 to affirmatively afford standing to file a complaint to any third party MVPD aggrieved by carriage agreements between other MVPDs and programming vendors that violate Section 616.[18] TCI and Liberty Media oppose the petition, contending, inter alia, that Section 616 was intended solely to benefit unaffiliated programming vendors.[19]

III. SUMMARY OF COMMENTS

9. Petitioner WCA argues that, in crafting the 1992 Cable Act, Congress chose to promote the emergence of competition to check cable's market power, and that the addition of Section 616 to the Communications Act of 1934 was an instrumental part of Congress' efforts to create a competitive marketplace.[20] WCA states that the record before Congress established that certain horizontally-concentrated Multiple System Operators ("MSOs") had systematically abused their market power to gain control over programming sources and frustrate the development of competitive technologies, and that "Congress expressly recognized that while fair access to programming was a prerequisite for any wireless operator or other MVPD to emerge as a viable competitor, the market power over programmers derived by these MSOs from their *de facto* local monopolies was being abused to frustrate competition."[21]

10. Petitioner WCA notes that the Second R&O is silent as to who has standing to file a complaint when a violation of Section 616 occurs. WCA contends that Section 76.1302 could be narrowly interpreted to limit standing solely to programming vendors aggrieved by violations of the carriage agreement provisions, thus precluding a complaint from an MVPD aggrieved by the same anticompetitive behavior. If so interpreted, WCA contends that the very purpose of Section 616 will be frustrated because an MSO with sufficient market power over a programming vendor to coerce exclusivity will be able to employ the same market power to secure that programming vendor's silence. WCA contends that in today's market a programming vendor will not risk alienating a horizontally-concentrated MSO by filing a carriage agreement complaint with the Commission.[22]

11. WCA contends that two recent situations support its claims that aggrieved programming vendors will not file complaints against powerful MSOs: (1) the Chairman of Viacom International, Inc., ("Viacom") testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights that Viacom has not complained of alleged anticompetitive abuses by TCI because of its fear of retaliation;[23] and (2) TCI allegedly has been able to coerce cable exclusivity from Fox Broadcasting Network ("Fox") for its new programming service, fX, by implicitly or explicitly threatening to drop Fox's broadcast affiliates from TCI's cable systems and/or refusing to carry fX absent a grant of exclusivity.[24] WCA argues that if wireless cable operators prevented from carrying fX because of such coerced exclusivity are barred from complaining by a narrow interpretation of Section 76.1302, there will be no effective method to redress such anticompetitive behavior.[25]

12. Liberty Cable, a satellite master antenna television operator, filed comments in support of WCA's petition. Liberty Cable agrees with WCA's assertion that Congress

---

[12] On April 1, 1993, the Commission adopted regulations to implement Section 628 of the 1992 Cable Act. See First Report and Order, 8 FCC Rcd 3359 (1993) (*"First R&O"*).

[13] 1992 Cable Act, § 2(b).

[14] *Id.* at § 2(b)(2).

[15] Second R&O, 9 FCC Rcd at 2642-43.

[16] Id. at 2648-49 (citing First R&O, 8 FCC Rcd at 3402).

[17] *Id.* at 2648-49.

[18] Petition for Partial Reconsideration by The Wireless Cable Association International, Inc., Dec. 15, 1993 ("WCA Petition"); Comments on Petition for Partial Reconsideration by GTE Service Corporation, May 24, 1994 ("GTE Comments"); Comments of Liberty Cable Company, Inc. on Petition for Partial Reconsideration, May 24, 1994 ("Liberty Cable Comments").

[19] Opposition of Tele-Communications, Inc. to Petition for Partial Reconsideration, May 24, 1994 ("TCI Opposition"); Opposition of Liberty Media Corporation to Petition for Partial Reconsideration, May 24, 1994 ("Liberty Media Opposition").

[20] WCA Petition at 2-3.

[21] Id. at 3.

[22] Id. at 4-5.

[23] Id . at 5-6 (citing Communications Daily, Oct. 28, 1993 at 2).

[24] *Id.* at 6.

[25] *Id.* at 5-6.

enactment of Section 616 implies a Congressional determination that a cable operator could use its control over programmers to impede its competitors. Liberty Cable further states that Congress manifested its concern about the impact of cable operators' coercive and retaliatory practices on both programming vendors and competing MVPDs in the program access and carriage agreement provisions of the 1992 Cable Act.[26] Liberty Cable agrees that the Commission's failure to specifically afford MVPDs allegedly victimized by a violation of Section 616 with standing to file a complaint severely limits the effectiveness of Section 616 and does not comport with Congressional intent. Liberty Cable also contends that an unaffiliated programmer will not risk alienating a powerful cable operator by filing a complaint.[27]

13. GTE, on behalf of its domestic telephone operating companies, also filed comments in support of WCA's petition. GTE contends that the purpose of Section 616 is to protect both video programming vendors and emerging distribution competitors from certain anticompetitive conduct undertaken by cable operators. GTE argues that, since programming vendors are unlikely to lodge complaints against operators which carry their shows, limiting standing under Section 616 to vendors which are party to the contract would frustrate Congressional intent. GTE also contends that the language of the statute does not support this unreasonable result. According to GTE, the plain purpose of Section 616 is to protect not only programmers, but also other MVPDs from prohibited coercive conduct.[28]

14. TCI filed an opposition to WCA's petition. TCI contends that the program carriage provisions in Section 616 were enacted solely for the benefit of programming vendors, and that the interpretation requested by WCA is at odds with the language of Section 616 and its legislative history. With respect to the language of Section 616, TCI contends that there is no mention of complaints to be filed by MVPDs, referring to the provision in Section 616(a)(4) for expedited review of "complaints made by a video programming vendor pursuant to this section," (emphasis added) and the definition of "video programming vendor" in Section 616(b).[29]

15. TCI further contends that the legislative history of Section 616 mandates rejection of WCA's requested interpretation. TCI notes that both the Conference Report and the House Report include references to expedited review of all complaints madep under this section of the Act.[30] According to TCI, if WCA is to prevail, it must convince the Commission that Section 616(a)(4) merely requires the Commission to give expedited treatment to complaints filed by programming vendors, while allowing non-expedited review for all other carriage agreement complaints. Thus, TCI concludes that the legislative history confirms that Congress intended that only programming vendors be permitted to file complaints under Section 616 of the Act.[31]

16. TCI responds to WCA's claim that cable operators will be able to coerce both exclusivity and silence from programming vendors by noting that Section 616(a)(2) expressly prohibits an MVPD not only from coercing exclusivity from a programming vendor, but also from retaliating against such a vendor for failing to provide exclusivity. According to TCI, this provision gives a programming vendor an opportunity for prompt and full redress if its rejection of a coercive demand is met with retaliation and voids any claim by WCA that the carriage agreement provisions will be weakened if competing aggrieved MVPDs are not permitted to file complaints.[32]

17. TCI further contends that the program access provisions in Section 628, rather than the carriage agreement provisions of Section 616, provide the appropriate avenue of redress for MVPDs. TCI contends that Section 628 of the Act, and the implementing rules promulgated by the Commission, allow exclusive contracts to be contested by third parties when the Commission makes its determination as to whether they are in the public interest,[33] while Section 616 allows video programming vendors to protect themselves from any coercive tactics which might be employed by MVPDs. According to TCI, the purpose of Section 628, and not Section 616, is to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market . . ."[34]

18. Finally, TCI argues that allowing MVPDs standing to file complaints under Section 616 will discourage parties from entering into contracts, including those that are in the public interest, because parties will not want to face the Commission's examination of their negotiating behavior. In addition, TCI claims that this will chill exclusive agreements that are in the public interest by allowing MVPDs to use the Section 616 complaint process to obtain potentially useful information regarding a rival's business practices.[35]

---

[26] Liberty Cable Comments at 2.

[27] *Id.* at 3.

[28] GTE contends that the language of Section 616(a)(2) itself supports its contention that the statute was intended to protect both programmers and other MVPDs because it directs the Commission to adopt rules that:

> prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system.

GTE Comments at 2.

[29] TCI Opposition at 3-4. Section 616(b) defines "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."

[30] TCI cites the statement in the Conference Report that Section 616(a)(4) provides for "expedited review of any complaints brought pursuant to" Section 616. Conference Report at 82 (1992). TCI also cites to the statement in the House Report statement that "[t]he FCC's regulations shall provide for expedited review of complaints made pursuant to this section . . ." House Report at 111.

[31] TCI Opposition at 5-6.

[32] *Id.* at 5-6.

[33] *Id.* at 7 (citing 47 C.F.R.§ 76.1002(c)(5) and 47 C.F.R.§ 76.1003).

[34] *Id.* at 7 (citing 47 U.S.C.§ 548(a) (1992)).

[35] *Id.* at 9-10. TCI contends that WCA's allegations regarding TCI's coercion of cable exclusivity for Fox's fX programming service is a prime example of the type of abuse that could result if WCA's petition prevails. TCI claims that although WCA's contention is without merit, if WCA prevails in its petition, it could then file a complaint under Section 616 and thereby delve into the intimate details of the business relationship and negotiations between TCI and Fox. *Id.* at 10.

19. Liberty Media also opposes WCA's petition, reiterating many of the same arguments made by TCI. Liberty Media contends that Section 616 and the Commission's implementing rules make it clear that only video programming vendors have standing. Liberty Media argues that the Commission's authorized remedies such as "mandatory carriage of complainant's programming" in Section 76.1302(s)(1) make sense only with respect to complaints brought by video programming vendors. Moreover, Liberty Media contends that other provisions in the implementing rules, including the notice provisions in Section 76.1301(a) and the statute of limitations provision in Section 76.1302(r), are premised upon a video programmer complainant.[36] Liberty Media also contends that, while the Commission sought to "strike a balance" in its regulations between proscribing prohibited behavior and preserving legitimate negotiations, WCA's proposal would destroy that balance by interjecting third parties into private negotiations or by permitting third-party discovery.[37]

20. In response to TCI and Liberty Media's opposition, both WCA and GTE filed Replies.[38] WCA contends that neither TCI nor Liberty Media identified a single provision in the 1992 Cable Act or its legislative history that expressly calls for the Commission to deny an aggrieved MVPD standing to complain when Section 616 is violated. WCA contends that while it appears that Congress gave little, if any, attention to which entities should be entitled to complain when a programmer is coerced into giving exclusivity, Congress was concerned with the impact that coerced exclusivity has on programmers as well as on the ability of emerging technologies to obtain the volume of programming necessary to compete.[39]

21. WCA further argues that TCI and Liberty Media's reliance on Sections 616(a)(4) and 616(b) are without merit and ignore that Section 616(a)(6) expressly contemplates that persons other than video programming vendors will be filing complaints. Section 616(a)(6) specifies that the Commission is to "provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section".[40] According to WCA, if TCI were correct, and Congress only contemplated that video programming vendors would be entitled to file complaints, this section would have called for the Commission to provide penalties to be assessed against only video programming vendors filing frivolous complaints.[41]

22. WCA also responds that Section 628 does not necessarily provide an effective remedy when a cable operator coerces exclusivity from a non-vertically integrated programming vendor. WCA contends that Section 628 is designed to address problems associated with vertical integration and is limited in scope to those situations where vertical integration proves problematic, and it is not implicated when a cable operator coerces an exclusive programming agreement from a programming vendor that is not vertically integrated.[42] Finally, WCA addresses TCI and Liberty Media's contention that WCA's petition, if granted, will lead to abuse. WCA contends that in order to avoid such abuses, Section 616(a)(6) of the 1992 Cable Act imposes penalties on those filing frivolous complaints.[43]

23. GTE also asserts that Section 628 does not reach all of the conduct prohibited by Section 616.[44] Moreover, GTE disputes Liberty Media's suggestion that Congress' express identification of one specific remedy for violations of Section 616 limits standing to video programming vendors, pointing out that the precise language of the statute directs the Commission to provide for appropriate penalties and remedies for violations of Section 616 "including" carriage.[45] According to GTE, this permissive language does not limit the Commission's ability to fashion appropriate penalties and remedies with respect to injured MVPDs. Finally, GTE argues that Congress specifically identified MVPDs as parties which could be injured by Section 616 prohibited conduct. Thus, according to GTE, limiting standing to video programming vendors contradicts the remedial intent of Congress by leaving parties specifically injured by the proscribed conduct without redress and is also contrary to accepted rules of statutory construction.[46]

IV. DISCUSSION

24. The Commission has determined that it is in the public interest to grant WCA's petition and to amend our implementing rules to specifically afford standing to MVPDs to file complaints under Section 616 of the 1992

---

[36] See Liberty Media Opposition at 3. Section 76.1302(a) provides, in part, "[a]ny aggrieved video programming vendor intending to file a complaint under this section must first notify the defendant . . . " Section 76.1302(r) states, in part, that complaints under the carriage agreement provisions must be filed within one year of certain events, including when "the multichannel video programming distributor enters into a contract with the complainant that the complainant alleges to violate [sic] one or more of the rules contained in this subpart . . ."

[37] Liberty Media Opposition at 6.

[38] Reply of The Wireless Cable Association International Inc., June 3, 1994 ("WCA Reply"); Reply Comments on Petition for Partial Reconsideration of GTE Service Corporation, June 3, 1994 ("GTE Reply").

[39] For example, WCA refers to the findings in the Senate Report that:

> In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.
>
> * * * * * *
>
> [T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors.

Senate Report at 23-24; *see also* House Report at 42-44; WCA Reply at 4.

[40] 1992 Cable Act, § 616(a)(6) (emphasis added).

[41] WCA Reply at 5.

[42] *Id.* at 6.

[43] *Id.* at 6-7.

[44] GTE Reply at 3. GTE argues in the alternative that if the Commission dismisses WCA's petition, the Commission must clarify that a MVPD may complain under Section 628 for conduct otherwise proscribed by Section 616.

[45] *Id.* at 4 (quoting 47 U.S.C. § 536(a)(5) (1992)).

[46] *Id.* at 4-5.

Cable Act. Based upon the record before us and the criteria set forth in the 1992 Cable Act and its legislative history, we believe that it serves the public interest if all potential violations of Section 616 are brought to the Commission's attention. The statutory purpose of Section 616 is further served if the Commission is made aware of such violations through complaints by both programming vendors and MVPDs alike. Indeed, the mere threat of potential complaints by allegedly aggrieved competing distributors is an added check on potential anticompetitive behavior by MVPDs with respect to carriage agreements. While we are affording standing to MVPDs to file complaints under Section 616, we emphasize that such complaints must be based on documentary evidence or testimony in the form of affidavits, and may not merely reflect conjecture or allegations based only on information or belief.[47] We believe that Section 76.1302(q) of our rules will afford adequate protection against any potential frivolous complaints as a result of our decision on this issue.[48]

25. Moreover, Liberty Media misplaces its reliance upon Sterling Suffolk *Racecourse L.P. v. Burrillville Racing Ass'n, Inc., 989 F. 2d 1266, 1270 (1st Cir. 1993), cert. denied*, 114 S. Ct. 634 (1993) (*"Sterling Suffolk"*), as support for its argument that neither federal agencies nor courts can substitute their judgment for that of Congress in extending standing to seek relief under federal statutes.[49] In Sterling Suffolk, the First Circuit held that in determining whether a private cause of action is implied in a federal statute, a court's central focus must be on congressional intent. The court listed three questions to discern this intent: (1) is the plaintiff one of the class for whose particular benefit the legislation was enacted; (2) is the remedy sought consistent with the underlying purposes of the legislative scheme; and (3) is the cause of action one traditionally relegated to state law? We disagree with Liberty Media's application of this standard to the issue before us on reconsideration as the question of a private right of action in court is different from the question of whether a party may bring an alleged statutory violation to an agency's attention. In any event, we believe that in this case the first two questions are answered in the affirmative. The third question has not even been raised as an issue by the parties and clearly is not relevant here.

26. There is nothing in the statute that limits standing only to aggrieved video programming vendors. Opponents point to Section 616(a)(4)'s reference to "expedited review of any complaints made by a video programming vendor pursuant to this section" (emphasis added) as a limitation on standing.[50] In contrast, as noted by WCA, Section 616(a)(6), appearing two sentences later in the statute, suggests otherwise. That section requires the Commission "to provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section".[51] suggesting that Congress intended to provide for a broader class of complainants than just programming vendors aggrieved by the specified conduct. Thus, in addition to the fact that there is nothing in the language of Section 616 which precludes standing to aggrieved MVPDs, such standing also fits well within the statutory purpose.

27. Further, we do not find anything in the legislative history of Section 616 that limits standing only to video programming vendors. To the contrary, the underlying premise of the program access and carriage provisions of the 1992 Cable Act was to increase competition to franchised cable operators from other MVPDs, reducing the undue market power held in noncompetitive markets by cable operators as compared to that of consumers and video programming vendors.[52] The legislative history shows that Section 616, like Section 628, was designed by Congress to prohibit unfair or anticompetitive actions without precluding legitimate business practices common to a competitive marketplace.[53] Indeed, Congress routinely treated Sections 616 and 628 in concert, thereby confirming its concern for the impact of anticompetitive conduct on programmers and on emerging MVPDs' access to programming. Thus, far from precluding an aggrieved MVPD from seeking relief under Section 616, the legislative history surrounding this section supports standing for such entities.

28. Moreover, as pointed out by petitioner WCA, a discussion by the Senate Committee on Commerce, Science and Transportation regarding what ultimately became Section 616 of the 1992 Cable Act, as passed by both houses of Congress, shows that in passing Section 616, Congress was concerned with the effect a cable operator's market power would have both on programmers and on competing MVPDs:

> In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.[54]

---

[47] Consistent with the Second R&O, an aggrieved distributor filing a complaint under Section 616 will have the burden of proof to establish a prima facie showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616. The complaint must identify the relevant Commission regulation allegedly violated, and must describe with specificity the behavior constituting the alleged violation. The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining distributor) setting forth the basis for the complainant's allegations. The complaint should specify the relief requested. If the complainant seeks mandatory carriage, the complaint should specify the desired duration and terms of such carriage, and should include the rationale and any documentary evidence supporting such request. *Second R&O*, 9 FCC Rcd at 2654. As noted in the Second R&O, a one-year statute of limitations will be applied to program carriage complaints. *Id.* at 2653.

[48] 47 C.F.R.§ 76.1302(q); *see infra* ¶ 32.

[49] Liberty Media Opposition at 4.

[50] We do not believe that because the statute provides for expedited review only of programming vendor complaints, it then follows that aggrieved MVPDs are precluded from filing complaints on a non-expedited basis. Rather, expedited review of programming vendors complaints is consistent with the fact that such vendors will be the ones most immediately impacted by a Section 616 violation.

[51] 1992 Cable Act, § 616(a)(6) (emphasis added).

[52] See, e.g., 1992 Cable Act, § 2(a)(2).

[53] *Second R&O*, 9 FCC Rcd at 2643.

[54] Senate Report at 23-24.

29. Contrary to TCI's and Liberty Media's assertions, the substantive differences between Section 628, which clearly grants standing to aggrieved MVPDs, and Section 616 support our decision to grant WCA's petition. Section 628 does not address all conduct proscribed under Section 616.[55] Whether or not the behavior at issue constitutes a violation of Section 628, however, we see no reason to deny MVPDs standing to file complaints for violations of Section 616.

30. Moreover, we share the concerns raised by WCA, Liberty Cable and GTE that programming vendors which may have been coerced into granting anticompetitive concessions to MSOs could lack the incentive to file a complaint because of potential damage to their future business relationships with such MSOs. TCI's assertion that Section 616 also prohibits retaliatory conduct by a cable operator against a programming vendor who refuses to grant exclusive distribution rights does not answer this concern. If an MSO has the market power to coerce the programming vendor to grant anticompetitive concessions in the first place, that the statute also proscribes retaliation by that MSO for failure to grant such concessions hardly provides additional incentives for that programming vendor to file a complaint if it is already too intimidated to report the coercion.

31. Thus, for the reasons discussed above, we conclude that it is in the public interest to amend the carriage agreement rules in accordance with WCA's petition. While we believe this approach is entirely consistent with the purpose and intent of the 1992 Cable Act, and indeed necessary to fully implement Section 616, we further note that it is well within the Commission's general authority in Sections 4(i) and (j) of the Communications Act of 1934, as amended,[56] to amend our rules in this manner.[57]

32. Finally, while we believe that amending the rule to grant standing to MVPDs aggrieved by violations of Section 616 serves important public interest goals, we also are mindful of the potential abuses that can result from the complaint process. In this regard, we note that Section 76.1302(q) of our rules specifically provides that:

> [i]t shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this sub-part. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.[58]

33. We intend to strictly enforce this prohibition against frivolous complaints. Furthermore, we caution that complaints filed pursuant to Section 616 must be based on documentary evidence or testimony in the form of affidavits, (signed by an authorized representative or agent of the complaining party) and may not merely reflect conjecture or allegations based only on information and belief. In this manner, we believe that the Commission's rules afford adequate protection against any potential frivolous complaints filed as a result of our decision to expand the scope of parties with standing to file carriage agreement complaints pursuant to Section 616.

34. For further information in this proceeding, contact Nancy Markowitz or Diane Hofbauer, Cable Services Bureau, (202) 416-0856.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-602, the Commission's final analysis is as follows:

35. *Need and purpose of this action:* This action is taken to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992.

36. *Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:* There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

37. *Significant alternatives considered:* We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program carriage agreement provisions of the 1992 Cable Act.

38. *Federal Rules which overlap, duplicate or conflict with these rules:* None.

39. *Paperwork Reduction Act Statement:* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirements on the public.

---

[55] Section 628(b) provides that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. § 548(b)(1992).

[56] Section 4(i) provides, in part, that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 4(j) provides, in part, that the "Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. §§ 154(i), (j).

[57] *See, e.g., Federal Communications Commission v. National Citizens Commitee for Broadcasting*, 436 U.S. 775, 790 (1978); Federal Communications Commission v. Schreiber, 381 U.S. 279 (1965) ("Schreiber"); RKO General, Inc. v. Federal Communications Commission, 670 F.2d 215, 232-33 (1981). In Schreiber, for example, the Supreme Court noted that under Section 4(j) of the Communications Act, "Congress has left largely to [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice." 381 U.S. at 289.

[58] 47 C.F.R. § 76.1302(q); *see also* 47 U.S.C. § 503(b).

VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and Section 616 of the Communications Act of 1934, as amended, 47 C.F.R. Sections 76.1302, 76.1302(a), 76.1302(r) and 76.1302(s) ARE AMENDED as set forth in Appendix A.

41. IT IS FURTHER ORDERED that, the regulations established in this Memorandum Opinion and Order shall become effective thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.1302 is amended by revising paragraphs (a)(r) and (s) to read as follows:

§76.1302 ***Adjudicatory Proceedings***

Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.

(a) Notice required. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in §76.1301 of this subpart. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

*****

(r) Statute of limitations.

Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) the multichannel video programming distributor enters into a contract with a video programming vendor that a party alleges to violate one or more of the rules contained in this subpart; or

(2) the multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this subpart; or

(3) a party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this subpart.

(s) Remedies for violations.

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period of time equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

*****

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1994

COMMENTS INVITED ON NORTHERN CALIFORNIA AREA PUBLIC SAFETY PLAN AMENDMENT

On November 20, 1990, the Commission accepted the Public Safety Plan for the Northern California area (Region 6). On May 9, 1994, Region 6 submitted a proposed amendment to its plan that would, in part, revise the current channel allotments. Because the proposed amendment is a major change to the Region 6 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **September 15, 1994** and reply comments on or before **September 30, 1994**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen Docket 90-287 Northern California-Public Safety Region 6.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Schurz Communications, Inc. — File No. 13131-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on the E-group channels at Hagerstown, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1994; Released: August 23, 1994

By the Chief, Video Services Division:

1. *Introduction.* The above-referenced application of Schurz Communications, Inc. (Schurz) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Hagerstown, Maryland was selected for qualification review as the result of a Commission lottery. Raystay Company (Raystay) filed a post-lottery Petition to Deny, challenging the application. Schurz filed a reply.

2. *Petition to Deny.* In its Petition, Raystay contends that Schurz violates the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), which establishes restrictions on cable operators.[1] Specifically, Raystay claims that Schurz is not legally qualified to hold an MMDS license in Hagerstown, Maryland because it already owns a cable system in that service area.[2] In addition, Raystay alleges that Schurz failed to file a "Common Carrier Radio Licensee Qualification Report," FCC Form 430. Raystay concedes that Schurz may have filed the FCC Form 430 with another application, but if it did so, Schurz failed to incorporate by reference the previously filed Form 430. Thus, Raystay argues that Schurz violated Section 21.13(b)(2) which provides that an applicant *must* specifically state where the previously filed information can be found if it intends to incorporate another filing by reference (emphasis added). For these reasons, Raystay maintains that the above-referenced application should be dismissed.

3. *Reply.* Schurz argues that Raystay's allegations are without merit and claims that its application was complete and acceptable for filing. Further, it contends that Raystay misinterprets the Cable Act and that it is legally eligible to own and operate an MMDS facility at Hagerstown, Maryland. Schurz acknowledges that the Cable Act prohibits a cable operator from owning an MMDS station in the same area in which it holds a franchise for a cable system. However, Schurz argues its operation of the Hagerstown MMDS station is grandfathered by the Cable Act and the Commission's rules, which specifically provides that MMDS applications filed prior to February 8, 1990 are not subject to the cable cross-ownership prohibitions.

4. *Discussion.* Section 309(d) of the Communications Act, 47 U.S.C. § 309(d)(1), provides that a petition to deny must "set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. *See, Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Our *prima facie* inquiry reveals that if the specific allegations of fact were taken as true, grant of the subject application would be inconsistent with the public interest, convenience, and necessity.

5. Section 21.912 of the Commission's rules provides, in part:

> [I]nitial or modified authorizations for stations in the 2150-2162 MHz and 2596 and 2680 MHz frequency bands may not be granted to a cable television company if a portion of the Multipoint Distribution Service (MDS) station's protected service area is within the cable television company's franchise area, unless that cable television company is not the sole provider of cable television service in the franchise area. No cable television company may acquire such an authorization either directly, or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company.

Under this rule provision, it would appear that Schurz is ineligible to be an MMDS licensee for Hagerstown, as Raystay alleges. However, at the time Schurz filed its application, cable operators could apply for and be authorized to operate MMDS channels within their franchise area. *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1262 (1983); *see also Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules, Pertaining to Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service (Notice of Proposed Rule Making and Notice of Inquiry)*, 5 FCC Rcd 971, 975 (1990).

[1] "Cable Operator" is defined in the Cable Act as any person or group of persons who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system. 47 U.S.C. § 522 (5).

[2] Raystay states that Schurz is the owner of Antietam Cable Television, Inc., which provides cable television service to Hagerstown and several other communities in Washington County, Maryland.

6. Further, we note that in the *Second Report and Order, id.*, the Commission stated that it would grandfather cable applications for MMDS channels filed before February 8, 1990. Moreover, in reviewing the effect that the implementation of the Cable Act would have on existing Commission rules, the Commission concluded that the Cable Act also provides for the grandfathering of cable interests in MMDS stations that already existed on October 5, 1992.[3]

7. Inasmuch as Schurz' application was filed before February 8, 1990, it is clearly grandfathered under the Commission rules and is also grandfathered under the 1992 Cable Act. Therefore, Raystay is incorrect in its assertion that Schurz is ineligible to hold the Hagerstown MMDS license because of the cable cross-ownership restrictions.

8. In addition, Raystay is incorrect in stating that no Qualification Report, FCC Form 430, was filed by Schurz. Our records show that an FCC Form 430 was simultaneously filed with Schurz' MMDS application for Hagerstown, Maryland. Schurz' FCC Form 430 has been on file at the Commission since September, 1983.

9. *Conclusion and Ordering Clause.* Having carefully considered all the pleadings and the evidence submitted, we find that the allegations raised by Raystay, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by Raystay Co. IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4, 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

[3] *Erratum, Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6212 (1993)("Applications filed by cable operators, or affiliates, for MMDS channels prior to February 8, 1990, will not be subject to the prohibitions of Section 21.912.")

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-58

In the Matter of

Amendment of Section 73.202(b),	RM-7419
Table of Allotments,	RM-7797
FM Broadcast Stations.	RM-7798
(Caldwell, College Station and Gause, Texas)	

ORDER TO SHOW CAUSE

Adopted: August 12, 1994; Released: August 23, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas, and modification of the construction permit of Station KHEN to specify operation on Channel 236C2. 6 FCC Rcd 1551 (1991). Bryan Broadcasting, L.C. ("Bryan Broadcasting"), licensee of Station KTSR, Channel 297C3, College Station, Texas, filed a counterproposal proposing the substitution of Channel 236C2 for Channel 297C3 in College Station, and modification of its Station KTSR license to specify operation on Channel 236C2.[1] In order to accommodate this upgrade, Bryan Broadcasting proposed the substitution of Channel 297A for Channel 236A at Caldwell, Texas, and modification of the Station KHEN construction permit to specify operation on Channel 297A.[2] To enable us to select between these competing proposals in the context of a subsequent *Report and Order*, we are issuing this *Order to Show Cause* to the permittee of Station KHEN.

2. We believe that both proposals in this proceeding would provide significant public interest benefits. Because changing the channel of Station KHEN is a modification of the construction permit within the purview of Section 316 of the Communications Act of 1934, as amended, we are issuing an *Order to Show Cause* to Roy E. Henderson to show cause why his construction permit should not be modified.[3] In accordance with Commission policy, Bryan Broadcasting has indicated a willingness to reimburse Roy E. Henderson for the reasonable costs of effectuating the channel substitution.[4]

3. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Roy E. Henderson, permittee of Station KHEN, Channel 236A, Caldwell, Texas, SHALL SHOW CAUSE why his construction permit should not be modified to specify operation on Channel 297A.

4. Pursuant to Section 1.87 of the Commission's Rules, Roy E. Henderson may, not later than October 7, 1994, file a written statement showing with particularity why his construction permit should not be modified as proposed in this *Order to Show Cause*. The Commission may call upon Roy E. Henderson to furnish additional information. If this party raises a substantial and material question of fact, a hearing may be required to resolve such question of fact pursuant to Section 1.87 of the Rules. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Roy E. Henderson will be deemed to have consented to a modification as proposed in the *Order to Show Cause* and a final *Order* will be issued if either of the proposed construction permit modifications are found to be in the public interest.

5. IT IS FURTHER ORDERED, That a copy of this *Order to Show Cause* be sent BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Roy E. Henderson
c/o Law Offices of Robert Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090

Bryan Broadcasting, L.C.
c/o Fisher, Wayland, Cooper & Leader
1255 23rd Street, NW
Suite 800
Washington, D.C. 20037

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

---

[1] Public Notice was given on September 11, 1991 (Report No. 14731). The counterproposal was originally filed by Hicks Broadcasting Corporation. The Station KTSR license was assigned to Bryan Broadcasting on April 19, 1992 (File No. BALPH-920106HV).

[2] In view of the fact that the proposed Channel 297A allotment at Caldwell is mutually exclusive with its existing Channel 297C3 allotment at College Station, Bryan Broadcasting is seeking to have its Channel 297C3 authorization modified to nonadjacent Channel 236C2 as an "incompatible channel swap." *See Modification of FM Broadcast Licenses to Higher Class Co-Channel and Adjacent Channels*, 60 RR 2d 114, 120 (1986); *See also Clincho, Virginia*, 6 FCC Rcd 3732 (1991).

[3] On February 15, 1994, Henderson filed a petition for reconsideration directed against a January 21, 1994, staff action deleting his Station KHEN construction permit. Final action in this proceeding will await resolution of that petition for reconsideration.

[4] A Channel 297A allotment at Caldwell can be accommodated at the existing Station KHEN transmitter site (30-33-31 and 96-34-50).

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules of Practice and Procedure

ORDER

Adopted: August 9, 1994; Released: August 24, 1994

By the Commission:

1. In this order, the Commission adopts a new rule explicitly providing that all documents are considered filed with the Commission upon receipt.

2. There are a number of Commission rules establishing deadlines for parties to take action, e.g., to file applications for review or petitions for reconsideration. Though some rules explicitly state when a document is deemed to be filed with the Commission, other rules do not. The Commission has had a consistent practice of considering documents filed with the Commission when the document is received at the location designated by the Commission.[1] However, there is no single rule that provides general guidance that a document is considered filed when it is received by the Commission. We believe adoption of such a general rule will avoid any potential uncertainty.

3. Because the rule amendment adopted here is a matter of agency practice and procedure, compliance with the notice and comment and effective date provisions of the Administrative Procedure Act is not required.[2]

4. Accordingly, IT IS ORDERED that Part 1 of the Commission's Rules IS AMENDED in the manner indicated in the Appendix, to be EFFECTIVE upon publication in the Federal Register.

5. Authority for this action is contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 1 (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read:

Authority: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.7 is added to read as follows:

§ 1.7 Documents are filed upon receipt

Unless otherwise provided in this Title, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.

[1] For example, in the fee context, the Commission has previously noted: "For purposes of determining receipt dates and conformance with filing deadlines, the submission will not be considered received by the Commission until received at the designated location." *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 1882 (1987). *See also* 47 C.F.R. § 0.401(b)(2); *Public Notice, FCC Overrules Caldwell Television Associates Ltd.*, 53 RR 2d 1686 (1983).

[2] 5 U.S.C. §§ 553(b)(A) & (d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-11

In the Matter of

Amendment of Section 73.202(b), RM-7881
Table of Allotments,
FM Broadcast Stations.
(Inglis, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1994; Released: August 24, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Chapman S. Root Revocable Trust ("Root"), licensee of Station WEZY-FM, Channel 231C1, Lakeland, Florida.[1] Root requests reconsideration of our action allotting Channel 282A to Inglis, Florida.[2] William D. Elliott filed comments supporting Root's petition. Lucille Ann Lacy filed comments opposing the petition for reconsideration.

2. *Background.* At the request of Lucille Lacy, the *Notice of Proposed Rule Making*[3] in this proceeding proposed to allot Channel 282A to Inglis as that community's first local FM service. Both William Elliott and Lucille Lacy filed comments expressing continuing interest in the proposed allotment, and no oppositions were filed to this proposal. As a result, the *Report and Order* allotted Channel 282A to Inglis. Thereafter, a construction permit was granted to Lucille Lacy for a new FM station on Channel 282A at Inglis.[4]

3. *Petition for Reconsideration.* While Root did not participate earlier in this proceeding, it has filed this petition for reconsideration because it believes that the allotment of Channel 282A at Inglis would prevent the grant of its application to upgrade its Station WEZY-FM, Lakeland, Florida, from Channel 231C1 to Channel 231C. Specifically, Root explains that, in order to grant its application, Station WRBQ(FM), Tampa, Florida, must switch from Channel 284C to Channel 283C.[5] Since the allotment of Channel 282A at Inglis conflicts with the substitution of Channel 283C at Tampa, Root requests that we now substitute Channel 242A at Inglis for Channel 282A to eliminate the conflict.

4. Root acknowledges that Channel 242A is the subject of a pending petition for allotment at the neighboring community of Yankeetown. However, Root contends that this is the only alternative channel that would not conflict with Channel 283C at Tampa. Root further argues that Channel 242A is not really needed at Yankeetown because (1) the Inglis and Yankeetown proposals are essentially identical in terms of both the area and population that would be served and (2) the populations of the two communities are very small.[6] As a result, Root requests that the allotment of Channel 282A at Inglis be deleted and that Channel 242A should be allotted to either Inglis or Yankeetown.

5. *Comments.* Elliott filed a comment in support of Root's proposal. In an opposition, Lacy contends that Root's petition for reconsideration is procedurally defective and should therefore be dismissed. Specifically, Lacy contends that Root has not complied with the requirements of Section 1.429 of the Commission's Rules because it has submitted impermissible new matter.[7] Since Root did not participate earlier in this proceeding, Lacy contends that it should be barred from doing so now.

6. Lacy further argues that Root's petition openly states that the reason for its filing is personal self interest, not the public interest. Lastly, Lacy contends that Root's assertions regarding its proposal for Lakeland, Florida, are speculative and without merit as they relate to this proceeding. Indeed, Lacy states that Root's proposed substitution of channels at Tampa was specifically rejected in another FM allotment proceeding, MM Docket 88-512.

7. *Discussion.* After careful consideration of the pleadings filed in this proceeding, we find that Root's petition for reconsideration should be denied. As previously noted, Section 1.429 governs the filing and consideration of petitions for reconsideration in notice and comment rulemaking proceedings. Section 1.429 permits grant of a reconsideration request based on facts not previously presented to the Commission under certain conditions. However, we find that the new matter that Root has introduced does not fit into these conditions.

---

[1] Public Notice of the petition was given on August 12, 1992, Report No. 902.

[2] *Report and Order*, 7 FCC Rcd 3446 (1992).

[3] 7 FCC Rcd 884 (1992).

[4] File No. BPH-920820MD. An application was subsequently granted on November 11, 1993, consenting to the assignment of the construction permit from Lucille Lacy to West Coast Radio Corporation.

[5] This channel switch would prevent a short-spacing under Section 73.207(b)(1), Table A, of the Commission's Rules which requires Class C FM stations on channels 10.6 MHz apart (*i.e.*, 53 channels removed from each other) to be separated by 48 kilometers (30 miles) to prevent intermediate-frequency (IF) intermodulation interference. *See Edens Broadcasting, Inc.*, 5 FCC Rcd 2576, 2578 n.1 (1990) for a brief explanation of IF interference.

[6] Root states that the 1990 populations of Inglis and Yankeetown were 1,241 and 602, respectively.

[7] Section 1.429 of the rules provides that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) the facts relied on relate to events which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest.

8. Specifically, Root is now contending for the first time in this proceeding that the allotment of Channel 282A at Inglis would conflict with the substitution of Channel 283C at Tampa. It also alleges that it "conducted a channel search for Inglis to find an alternative channel that would not conflict with Channel 283C at Tampa" and that the use of Channel 242A at Inglis would resolve this conflict. However, we do not believe that these are events that have changed since the last opportunity to present them to the Commission or are facts that could not have been learned of by the petitioner through the exercise of ordinary diligence until after its last opportunity to present them to the Commission, within the meaning of Section 1.429 of the Rules. On the contrary, since we allotted the same channel that we had originally proposed in the *Notice of Proposed Rulemaking* in this proceeding, Root could have discovered the conflict between the Inglis and Tampa channels and participated earlier in this proceeding. Indeed, we note that Root had filed this same proposal in MM Docket 88-512, which was dismissed for reasons of a short-spacing to an Atlantic Beach, Florida station.[8] Likewise, by exercising ordinary diligence, it could have discovered the availability of Channel 242A and brought its concerns to our attention in both the instant proceeding, as well as in MM Docket No. 92-60. However, it did not participate in either proceeding, and Channel 242A was allotted to Yankeetown, Florida, in MM Docket No. 92-60, making it unavailable as an alternative channel in the instant proceeding.[9] Under these circumstances, the new matter presented by Root cannot be considered at this time and should have been filed before the counterproposal deadline in this proceeding pursuant to Section 1.420(d) of the Commission's Rules.

9. Beyond the above described deficiencies with Root's petition for reconsideration, we note that changed circumstances have mooted the basis for the relief requested by Root. Specifically, there is no longer a need for Root to substitute Channel 283C for Channel 284C at Station WRBQ(FM), Tampa, Florida, because that station was subsequently downgraded from Channel 284C to Channel 284C1 as a result of the Commission's dismissal of its application to retain Class C status. *See Edens Broadcasting, Inc.*, 5 FCC Rcd 2576 (1990), *aff'd sub nom. Edens Broadcasting, Inc. v. FCC*, No. 91-1387 (D.C. Cir. June 17, 1992). *See also Public Notice on Reclassification of FM Facilities Pursuant to BC Docket 80-90*, 2 FCC Rcd 2124 (1987).[10] Furthermore, Root's Station WEZY-FM, Channel 231C1, Lakeland, Florida, was granted a construction permit to upgrade to Channel 231C.[11]

10. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Chapman S. Root Revocable Trust IS DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding is terminated.

12. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau., (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

---

[8] *See Bonita Springs*, 6 FCC Rcd 6966 (1991).
[9] *See Yankeetown, FL*, 8 FCC Rcd 4274 (1993).
[10] As a result of Station WRBQ-FM being downgraded to Channel 284C1, the required spacing between Station WRBQ and WEZY(FM), Lakeland, is reduced from 48 to 41 kilometers.
[11] File No. BMPH-930914IF.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications	CSR-3961-M MO0865

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1994; Released: August 24, 1994

By the Chief, Cable Services Bureau:

1. On February 4, 1994, a petition for reconsideration was filed on behalf of Douglas Communications Corporation II ("Douglas"), operator of a cable system serving Kingsville, Missouri.[1] Douglas requests that the Commission reconsider its December 6, 1993 action[2] ordering its Kingsville, Missouri system to carry Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri. An opposition to this petition was filed February 14, 1994, to which Douglas has responded.

2. In support of its request, Douglas states that the Kingsville systems serves only 50 subscribers and has only 10 usable, activated channels. It argues that in order to carry KMOS-TV it would be forced to remove programming that has been provided to its subscribers since at least March 29, 1990. Douglas maintains that §535(b)(2)(B)(iii) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), and §76.56(a)(3) of the Commission's Rules specifically exempt small systems, such as Douglas', from the signal carriage requirements applicable to qualified NCE stations. It therefore concludes that it should not be required to add KMOS-TV to the Kingsville system.

3. KMOS-TV argues in its response that Douglas' claim that it is not required to add KMOS-TV because its system has only 10 usable, activated channels directly conflicts with §615(2)(A) of the 1992 Cable Act which requires that systems with 12 or fewer channels are required to carry the signal of at least one local noncommercial educational television station. KMOS-TV avers that at the present time Douglas provides no educational stations to its subscribers. It contends, therefore, that to avoid further irreparable harm to its station, Douglas should be required to add KMOS-TV to its system.

4. In its response, Douglas reiterates its reliance on §76.56(a)(3) of the Commission's rules which states that "cable system with 12 or fewer usable activated channels *shall not be required to remove any programming service provided to subscribers as of March 29, 1990, to satisfy these requirements*, except that the first available channel must be used to satisfy these requirements (emphasis added)." Since all of its 10 activated channels on the Kingsville system are currently occupied by programming that has been carried since at least March 29, 1990, Douglas maintains that it is not required to add KMOS-TV to its system until such time as channel space become available on the system.

5. We are not persuaded by the arguments raised by KMOS-TV. Section 76.56(a)(3) of the rules clearly provides for an exception to the must-carry requirements for NCE stations in those instances where cable systems have 12 or fewer usable channels. Douglas has clearly shown that such is the case for the system herein. It should be emphasized, however, that as soon as the channel capacity becomes available on the Kingsville system, Douglas will be required to add KMOS-TV in order to fulfill its obligation to carry at least one NCE station pursuant to §76.56(a)(1)(i) of the Commission's Rules.

6. In light of the above, therefore, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petition for reconsideration, filed February 4, 1994, on behalf of Douglas Communications Corporation II, IS GRANTED and our Order adopted October 12, 1993 IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] An "Emergency Petition for Stay" was filed concurrently with this petition requesting that the Commission stay the effective date of its decision until it acts on Douglas' reconsideration request. In view of our action today, we need not address Douglas' arguments in support of a stay.

[2] *Central Missouri State University against Douglas Cable Communications*, 9 FCC Rcd 238 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Press Broadcasting, Inc. against Cablevision of Central Florida — CSR-4116-M

Request for Carriage and Channel Positioning

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1994; Released: August 24, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993, the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] On June 17, 1993, local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5]

SUMMARY OF PLEADINGS

2. On October 5, 1993, Press Broadcasting Company, Inc. (Press), licensee of WKCF (TV), filed a complaint against Cablevision of Central Florida (CV) for the latter's failure to comply with the channel positioning requirements of the Commission's Rules and the 1992 Cable Act.

3. According to its complaint, on June 17, 1993, Press notified CV that Press had elected must-carry status on CV's system. CV was advised that Press wished to be carried on channel 8 of CV's system rather than its current position on channel 18. Press did not receive a formal rejection of its channel positioning request until receipt of a September 28, 1993 letter from CV. However, between Press's initial notification and CV's formal rejection there were informal discussions and additional correspondence between the parties regarding channel positioning for WKCF.

4. Press's argument is, in essence, that CV is required under Section 614(b)(6) of the Communications Act and Section 76.57 of the Commission's Rules--to negotiate with Press for a mutually agreeable channel position. Complainant believes that the 1992 Cable Act and Commission's Rules offer it four options with regard to channel positioning, one of which requires CV to negotiate in good faith concerning channel positioning and not refuse a channel positioning request on the basis of what Press terms "unreasonable anti-competitive excuses." Thus, Press requests that the Commission order CV to negotiate with Press in good faith concerning the channel position of station WKCF(TV); that CV be required to provide written explanations for any refusal to grant Press its preferred channel position; and that the Commission rule other alternatives –"including... the possibility of paying CV some consideration in connection with obtaining satisfactory channel position"[6] – not be deemed to have been adversely affected or restricted due to CV's delay in responding to Press's channel positioning request.

5. In it's reply to complainant, CV stated its belief that neither the 1992 Cable Act nor the Commission's Rules compelled it to negotiate in good faith with Press regarding WKCF's channel position, nor required a written explanation as to why it refused to assign WKCF to channel 8.

DISCUSSION

6. There are three options available to broadcast stations electing must-carry: 1) a station may elect to be carried on its over-the-air channel; or 2) on the channel on which it was carried on July 19, 1985; or 3) on the channel on which it was carried on January 1, 1992.[7] The rules also provide that a broadcast station may be carried "on such other channel as is mutually agreed upon by the station and the cable operator."[8] Press interprets "on such other channel as is mutually agreed upon by the station and the cable operator" as a fourth option available to broadcasters, one that compels CV to engage in good faith negotiations with Press "designed to provide [Press] with a channel position consistent with [Press's] competitive situation in the marketplace."[9] We disagree that the 1992 Cable Act or the Commission's Rules offer a fourth mandatory channel positioning option to broadcasters.

7. We read the 1992 Cable Act and the Commission's Rules to unambiguously state the three options available to a broadcaster.[10] Allowing cable operators and broadcasters

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).

[3] 47 C.F.R. § 76.56(a),(b).

[4] 47 C.F.R. § 76.64(f)(1).

[5] 47 C.F.R. § 76.57(d).

[6] Since cable operators may not accept or request money or other forms of valuable payment in connection with must-carry or channel positioning obligations, we must assume that Press requests us to rule that it still has the option of pursuing retransmission consent.

[7] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

[8] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(c).

[9] Press's reply to Cablevision's response to original complaint, at page 7.

[10] *See Report and Order*, 8 FCC Rcd. at 2986. "The election of which of these three alternatives is left up to the station involved." "We also note that the 1992 Cable Act provides three channel positioning options for each commercial station and two for each NCE station, and also provides an opportunity for parties to develop their own solutions to conflicting claims." *Id.* at 2988.

to mutually agree upon a different channel provides a mechanism for the two to mutually agree on a channel positioning option outside of the three proposed by the 1992 Cable Act's provisions. To read this flexibility as a mandatory fourth option would totally obviate the prior three options as broadcasters and cable operators would clash seeking what they viewed as more favorable channel positioning.

8. In the present case, WKCF is carried by CV on channel 18. Channel 18 is WKCF's over-the-air channel. WKCF was not in operation on July 19, 1985, and was carried on channel 30 on January 1, 1992. CV has offered to continue carriage of WKCF on channel 18 or some other channel mutually agreeable to the parties. Originally, Press was satisfied with channel 18 because the location was immediately adjacent to a competitor station. However, once that competitor moved to a lower channel position, Press requested relocation of WKCF. Press sums up its position as having "been left in the second-rate portion of CV's basic tier, with the odds and ends services, while WKCF (TV)'s primary competitors can easily be found, grouped together in the first-rate portion of the basic tier (although not on their on-air channels)."[11]

9. We certainly understand Press's desire to remain as competitive as possible. However, there is no specific nor implicit requirement that cable operators must arrange their basic tier such that some sort of economic equilibrium amongst broadcasters is attained or maintained. Inferring such a requirement would complicate channel positioning election beyond anything envisioned by Congress. Thus, we find that CV has complied with the requirements of the 1992 Cable Act and find no reason to order CV to negotiate with Press regarding channel positioning. Additionally, we find no reason for CV to provide a written explanation for its refusal of Press's request.

10. Complainant argues that CV's failure to engage in good faith negotiations well in advance of October 6, 1993 prevented Press from taking advantage of the retransmission consent option. However, the 1992 Cable Act is quite clear that television stations must make an election between must-carry and retransmission consent within one year after the date of enactment of the 1992 Cable Act and every three years thereafter.[12] Press requested must-carry status on July 17, 1993. Thus, once Press chose carriage via must-carry, it lost its ability to bargain with regard to channel positioning under the 1992 Cable Act's retransmission consent provisions.[13]

11. Accordingly, the petition filed on October 5, 1993, by Press Broadcasting Company, Inc. IS DENIED, in accordance with Section 325(b)(3)(B) (47 U.S.C. § 325) of the Communications Act of 1934, as amended. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[11] Press's reply to Cablevision's response to original complaint, at page 7.

[12] Section 325(b)(3)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 325(b)(3)(B) (1992).

[13] 47 C.F.R. § 76.64(f)(1)-(5). We can envision a situation in which a station initially elects must-carry but then avails itself of retransmission consent, *see* 8 FCC Rcd at 3003, para. 162, but the exception would not apply in the present case. One additional matter has come to our attention, though this issue does not implicate our must-carry rules. In its reply to CV's response, Press states that it "understands... that there was a realignment [sic] [of channels on CV's system] which had previously been part of the system's secondary service tier (for which no additional charge was required)" but now "were segregated into a new tier for which CV now charges additional fees in a negative billing' arrangement automatically costing the consumer $3 per month unless the consumer specifically requests deletion of any or all of the services." Without more information, it is difficult for us to determine whether, assuming true, CV's billing constitutes negative option billing. However, we would strongly remind all cable operators that such practices are impermissible under the 1992 Cable Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of KTEH-TV Foundation against Viacom Cable — CSR-4181-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1994; Released: August 24, 1994

By the Chief, Cable Services Bureau:

1. On January 5, 1994, a petition on behalf of KTEH-TV Foundation, licensee of Television Broadcast Station KTEH (Educ., Ch. 54), San Jose, California, was filed with the Commission claiming that Viacom Cable ("Viacom"), operator of a cable television system serving Marin, Napa, Petaluma, Pinole, Crockett and American Canyon, California,[1] had deleted the station as of June 2, 1993, because it had determined that the Grade B contour of KTEH does not encompass the system's principal headend located at Big Rock Ridge, California at north latitude 38°03'20" and west longitude 122°35'53" and, therefore, the station is not a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). An opposition to this petition was filed February 15, 1994, on behalf of Viacom.

2. In support of its request, KTEH states that it was carried on the Marin system on March 29, 1990.[2] However, KTEH indicates that by letter dated April 30, 1993, Viacom notified it that it would be deleted from the system on June 2, 1993, because the system headend was located outside the predicted Grade B contour of KTEH as filed with the Commission. On July 7, 1993, KTEH states that engineers from both its station and Viacom jointly measured KTEH's signal at 92.8 dBu/m at the Big Rock Ridge headend. Subsequently, KTEH requested carriage a second time, but it avers that it was again denied such carriage by Viacom. KTEH argues that, pursuant to §73.683(b) of the rules, the Grade B predicted contour curves of the station should be modified to include the Big Rock Ridge headend based on actual signal strength measurements and it submits maps and engineering data to support this request. KTEH asks that the Commission rule that the Big Rock Ridge system headend falls within KTEH's Grade B contour and order Viacom to carry its signal.

3. In its opposition, Viacom states that KTEH's petition was untimely because it was not filed with the Commission within sixty days of Viacom's June 14, 1993 notification as required by §76.7(c)(4)(iii)(B) of the Commission. It maintains further that it is not obligated to carry KTEH because it does not meet the definition of a qualified noncommercial educational television station. *See* §615(l)(2) (47 U.S.C. 535). Further, Viacom argues that KTEH's engineering showing is misplaced. Viacom maintains that §615(1)(2)(B) of the 1992 Cable Act provides that the only approved definition of an NCE station's Grade B service contour is that contained in §73.683(a) of the Commission's Rules which mandates the use of predicted contours. To allow individual Grade B showings such as KTEH proposes, avers Viacom, would cause excessive hardship and exacerbate the already substantial burdens imposed by the must carry rules. Finally, Viacom argues that while there are specifically established procedures to demonstrate whether a station delivers a good quality signal, those procedures only apply to stations which are entitled to carriage.

4. We are not persuaded by KTEH's request to be considered local on the Marin system. First, KTEH's reliance for its reinstatement due to its carriage on the Marin system as of March 29, 1990, is in error. Section 615(c) states that "all cable operators shall continue to provide carriage to *all qualified local noncommercial educational television stations* whose signals were carried on their systems as of March 29, 1990." (emphasis supplied). Section 76.55(b) of the Commission's Rules defines a qualified noncommercial educational station as either one whose community of license is located within fifty miles of a cable system's principal headend or one whose Grade B service contour encompasses the principal headend. Since KTEH does not meet either of these definitions, Viacom was not obligated to continue its carriage on this ground.

5. Further, we agree that KTEH's suggested methodology for demonstrating signal availability is not appropriate here. It was recognized when the Commission first adopted its television broadcast signal contour prediction system, that a service contour does not represent a point at which a signal's availabilty abruptly terminates or conversely that a signal is always available within the contour. Rather the Commission recognized, and the rules reflect, that such contours are useful administrative tools for establishing rights and responsibilities of individual stations and parties in a variety of areas from ownership regulation to interference protection. Given that signals gradually diminish in strength with distance and that reception varies according to equipment and terrain features, no absolute rather than statistical measure is available. Predicted service contours nevertheless have been widely used as a means of fixing service boundaries that can be calculated with a minimum of expense and dispute. The use of the Grade B contour standard in the mandatory carriage rules, reflects this desire to have a readily available standard. Thus, KTEH's proposal to use a different process that is not consistent with this objective is not acceptable here. Relying on the Commission's prescribed predicted Grade B contour method, KTEH does not encompass the Marin headend and, therefore, does not qualify for must-carry status under this criterion on the Marin system.

---

[1] KTEH states that Viacom also generally serves the communities of San Rafael, Belvedere, South Sausalito, Sausalito, Corte Madera, Tiburon, Larkspur, Fairfax, Ross, Mill Valley, San Anselmo and adjacent and nearby unincorporated portions of Marin County, California.

[2] KTEH indicates that it has been carried on the Marin system since at least 1985.

6. In view of the foregoing, therefore, the 1992 Cable Act does not entitle KTEH to mandatory carriage on the Viacom cable television system serving Marin, California, and the complaint filed January 5, 1994, IS DISMISSED pursuant to authority delgated by §0.321 of the Commission's Rules and §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

PLAINS TELEVISION PARTNERSHIP
(Assignor)

and File No. BALCT-931124KJ

GUY GANNETT PUBLISHING CO.
(Assignee)

For Consent to Assign the License for Station WICD(TV), Champaign, IL

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1994; Released: August 25, 1994

By the Commission:

1. The Commission has before it the unopposed application to assign the license of television station WICD(TV) (NBC), Channel 15, Champaign, Illinois, from Plains Television Partnership ("Plains") to Guy Gannett Publishing Co. ("Gannett"). Gannett is the licensee of WICS-TV (NBC), Channel 20, Springfield, Illinois. The Grade B contours of WICD(TV) and WICS-TV overlap. Thus, Gannett proposes to operate WICD(TV) as a satellite of WICS-TV,[1] in accordance with the satellite exception to the duopoly prohibition set forth in Note 5 to Section 73.3555 of the Commission's Rules.[2]

2. Under our satellite policy, *See Television Satellite Stations*, 6 FCC Rcd 4212 (1991),[3] an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets three criteria: (1) there is no City Grade contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. *Id.* at 4213-14. The Commission will view favorably applications that qualify for the presumption and are unrebutted by an opposing party. *Id.* at 4214. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis and grant the application if there are other compelling circumstances that warrant approval. For the reasons set forth below, we find that the proposed operation of WICD(TV) as a satellite is consistent with our policy.

3. In support of its request that WICD(TV) be permitted to operate as a satellite of WICS-TV, the applicant contends that its proposal meets the three criteria for presumptive grant. First, the applicant states, there is no overlap of the City Grade contours of the two stations. Second, WICD(TV)'s area of service is underserved in accordance with the Commission's "transmission test." Finally, the applicant argues that no party would be willing and able to operate WICD(TV) on a stand-alone basis because of the nature of the Springfield-Decatur-Champaign market. In addition, the applicant argues that the Grade B overlap of WICS-TV and WICD(TV) only amounts to 2.6% of the population in the WICD(TV) contour and 2% in the WICS-TV contour. The applicants point out that the Commission found a similar overlap to be insubstantial when it approved the operation of WCCU(TV) (Urbana) as a satellite of WRSP-TV (Springfield). *Springfield Independent Television*, 3 FCC Rcd 1606, 1607 (1988). Further, the applicant states that approximately 11,348 people, or 1.1% of the total population served by the combined Grade B contours of WICD(TV) and WICS-TV reside within the Grade B contour overlap area.

DISCUSSION

4. With regard to the first criterion of the public interest presumption, the applicant has submitted an engineering study which demonstrates that the present City Grade contours of WICD(TV) and WICS-TV will not overlap. Thus, the satellite proposal meets the first component of the presumption.

5. With respect to the second criterion, the applicant has demonstrated that the area is underserved using one of our two tests. The first is a "transmission test," which defines as "underserved" an area with two or fewer full-service stations licensed to the community.[4] The applicant has shown that there is only one other full-service television station licensed to Champaign, television station WCIA-TV. Accordingly, the applicant's proposal meets the second criterion for the satellite presumption.

6. Finally, to qualify for the presumption, an applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Initially, it should be noted that WICD(TV) has never been operated as an independent, stand-alone station, nor has it been offered for sale. *See* note 1. The applicant makes a claim that WICD(TV) should be treated as a new or unbuilt station and that the request for satellite status therefore does not require a

[1] We note that WICD(TV) has been operated under a Joint Operating Agreement (the "JOA") with WICS-TV since 1980. Under the JOA, the two stations have utilized certain common personnel, jointly sold advertising and purchased film products, and simultaneously broadcast certain network and non-network programming. When Gannett purchased WICS-TV in 1985, it assumed the JOA, which provides, in general, that WICS-TV makes available the funds to operate both stations and that revenues are shared 65% to WICS-TV and 35% to WICD(TV). The JOA expires in 1995, and Gannett has decided not to renew the agreement.

[2] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application now before us will not implicate the 12-station rule.

[3] Although a petition for stay and partial reconsideration is pending, that petition does not raise matters germane to the issues under consideration herein.

[4] We have also defined an "underserved area" in terms of a "reception test," but that test is not material here. *See Television Satellite Stations* 6 FCC Rcd at 4215.

showing that no alternative operator is willing and able to purchase the station and operate it as a stand-alone facility. The applicant premises its claim on the odd size of its market, on overall broadcaster diversity in the market, on precedent involving other satellite requests in the same ADI, and on an economic study explaining the non-viability of WICD(TV) as an independent station. Although these arguments do not persuade us that WICD(TV) should be treated as a new or unbuilt station, they do justify satellite operation based on our *ad hoc* analysis.

7. *Ad hoc analysis.* Applicants note that WICD(TV)'s market, the Springfield-Decatur-Champaign ADI, is an area extending more than 150 miles from east to west and containing three large cities.[5] Of these cities, applicants note, only Decatur is centrally located, while Champaign is located on the eastern side of the market. Consequently, WICD(TV) in Champaign cannot cover its entire market, and the station would be at a competitive disadvantage, applicants claim, if it were forced to operate on a stand-alone basis. Specifically, applicants note that 24 commercial television stations can be viewed over the air in the ADI and that seven commercial and three educational television stations are licensed to communities within the market.[6] In addition, 25 radio stations are licensed to communities in the market, including fourteen in Champaign-Urbana.[7] Further, applicants state that cable penetration is 70% throughout the ADI and that six newspapers of either daily or weekly circulation serve the Champaign-Urbana area.[8] Applicants contend that the plethora of communications sources in the market represent formidable competition which would inhibit WICD(TV)'s ability to function on a stand-alone basis. Applicants note that the Commission has previously authorized satellite operations for other network-affiliated stations which share the geographical constraints of WICS-TV and WICD(TV): WCFN(TV) (Springfield) operates as a 100 percent satellite of WCIA(TV) (Champaign)(CBS); and WCCU(TV) (Urbana) operates primarily as a satellite of WRSP-TV (Springfield)(Fox). *See Springfield Independent Television, supra;* and *Midwest Television,* FCC 84M-4450 (released Oct. 17, 1984).

8. Further, applicants have submitted an economic analysis of WICD(TV)'s market, including an estimate of the likelihood of WICD(TV)'s success in competing as a stand-alone station. The analysis, performed by Harrison, Bond & Pecaro, a consulting firm specializing in financial and economic analyses for the broadcast industry, concludes that, even making optimistic assumptions, operation of WIDC(TV) as a stand-alone station would not be profitable. Specifically, the analysis shows that WICD(TV), if operating alone, would have to fund the costs of acquiring broadcast rights to programming and would not be able to provide programming of a quality equivalent to that which it now broadcasts. The analysis calculates that as a result of the decline in program quality and the consequent erosion of the number of station viewers, WICD(TV) would suffer a decrease in operating cash flow from $63,000 in 1993 to a loss of $39,000 in 1997. The analysis further estimates a decline in net after-tax cash flow from $13,000 in 1993 to a loss of $89,000 in 1997. The analysis computes a cumulative present value loss of $123,000 by the end of 1997.[9] According to the applicants, the geographic configuration and the competitive nature of the Springfield-Decatur-Champaign ADI make WICD(TV) an unattractive property to prospective purchasers. Indeed, a principal of Harrison, Bond and Pecaro opined that "no rational investor would contemplate acquiring WICD(TV) to operate it as a full-service, stand-alone entity, given the dismal prospect for its profitability ..." The applicant therefore concludes that an attempt to sell the station to such a purchaser would be unavailing and that satellite operation is the only possibility for keeping WICD(TV) in operation.

9. The applicant has demonstrated convincingly the ecomonic difficulties which would prevent WICD(TV) from operating successfully on a stand-alone basis, after the expiration of the JOA. As we previously noted, the geographic area of the Springfield - Decatur - Champaign market, which has fallen from the 64th largest television market in 1988 to the 74th today, is unusual due to its extreme length, and only stations that are centrally located or have the use of other facilities can serve the entire market. *See Springfield Independent Television,* 3 FCC Rcd at 1607. We believe that the Springfield - Decatur - Champaign market is not likely to support the operation of WICD(TV) as a stand-alone, full-service station. We also find that diversity and competition will not be diminished by grant of the satellite request, since the two stations have long operated in concert pursuant to the JOA. *See Sidney T. Warner,* 3 FCC Rcd 4034 (1988). Based on the information before us, we conclude that the proposed satellite operation is warranted.

10. In view of the foregoing, we conclude, having found that the applicant is qualified in all other respects, that a grant of the application would serve the public interest, convenience, and necessity.

11. Accordingly, IT IS ORDERED, That the application of Plains Television Partnership (BALCT-931124KJ) for consent to assign the license of television station WICD(TV) to Guy Gannett Publishing Co. IS HEREBY GRANTED.

---

[5] The Springfield-Decatur-Champaign ADI is ranked by Arbitron as the 74th largest Area of Dominant Influence. See *1993 Television and Cable Factbook.*

[6] The other commercial stations located in the market are: WAND(TV) and WFHL(TV)(both in Decatur), WICS(TV) and WRSP-TV (both in Springfield), WCIA(TV) (in Champaign), and WCCU(TV) (in Urbana). The educational stations in the ADI are WILL-TV (Urbana), WSEC(TV) (Jacksonville), and WEIU-TV (Charleston).

[7] Radio stations licensed to Champaign-Urbana are WBCP(AM), WBGL(FM), WDWS(AM), WHMS(FM), WEFT(FM), WILL(AM)-FM, WKIO(FM), WLRW(FM), WLTM(FM), WPCD(FM), WPGU(FM), WUFI(AM), and WZNF(FM).

[8] Newspapers which serve Champaign-Urbana are *The Champaign-Urbana News Gazette, The Illinois Times, The Daily Illini,* and *The Illini Times. The Decatur Herald & Review* and *The Springfield State Journal* are also distributed in the Champaign-Urbana area.

[9] The applicant also notes that WICS-TV would be unlikely to survive without WICD(TV) if that station were to fail.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lawrence E. Vaughn, Jr.

Request for a Finder's Preference for
Station WNXE819 licensed to Ross Shade Trust
Sherman Oaks, California

ORDER

Adopted: August 17, 1994; Released: August 18, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. On March 11, 1994, Lawrence E. Vaughn Jr. filed a request for a finder's preference request for Station WNXE819. The finder has presented evidence that the target licensee, Ross Shade Trust, constructed its station approximately 0.95 kilometers (3100 feet) from its licensed coordinates. In the finder's preference context, we hold that the quantum of proof necessary to demonstrate that a station is not constructed in substantial accordance with its authorized coordinates is a showing that the station is not constructed within 1.6 kilometers (one mile) of those coordinates. For the reasons that follow, the finder's preference request is denied.

2. In the Fall of 1991, the Commission established the finder's preference program in the Private Land Mobile Services as a complement to its compliance function.[1] The program allows private entities to obtain a dispositive preference for a license that has cancelled pursuant to the Commission's rules.

3. The Commission, when it established the finder's program, limited the program to rule violations that lend themselves to conclusive and expeditious action. 6 FCC Rcd at 7305 (para. 49). Because of the variety of possible rule violations, it gave little guidance regarding the quantum of proof necessary to obtain a preference for particular violations.

4. In this case the finder has presented evidence that the target licensee constructed its station approximately 0.95 kilometers (3100 feet) from the licensed location. The finder alleges that this constitutes a violation of 47 C.F.R. § 90.631(f).[2] The target licensee states that the street address is correct on its license, and that it relied on the coordinates listed on a previous license issued to the site owner in 1984.

5. The Commission discussed the placed-in-permanent operation requirement in the same order in which it established the finder's preference program. At that time the Commission stated:

> Construction of the base station must be in substantial accordance with the parameters specified in the station authorization (e.g., authorized antenna height). All channels not so "constructed" will be recovered from the licensee.

6 FCC Rcd at 7299 (para. 9). The present case requires us to determine a reasonable standard on which to base a finder's preference when a station is not constructed precisely at its authorized coordinates.

6. As the finder's preference program has developed, we have determined on a case-by-case basis whether sufficient evidence was presented to demonstrate that particular systems were not constructed in substantial accordance with their parameters. In *In the Matter of Fred B. Lott*, we decided that a station built five miles from its authorized coordinates was not constructed in substantial accordance with its authorized parameters.[3] We noted that as a rule of thumb, construction more than one second (60 feet) away from the licensed location is not in accordance with the station's authorization. This comes from the long standing policy relating to when a licensee should file a modification application to correct its coordinates.

7. In another action, on December 29, 1993, we awarded a finder's preference to Confidential Communications based on evidence that the target licensee had constructed for two weeks at less than half its authorized antenna height.[4] In addition to the variance from the authorized parameters, the target licensee failed to permanently construct its station.

8. In order to facilitate the handling of finder's preference requests, we are adopting an objective guideline for determining when we will allow recovery of channels through the finder's preference program due to construction of stations at parameters other than those authorized. With respect to a variance from authorized coordinates, absent unique circumstances, we will only award a finder's preference for a constructed and operating station when a finder demonstrates that the authorized coordinates are more than 1.6 kilometers (one mile) from the actual loca-

---

[1] Report and Order, PR Docket No. 90-481, 6 FCC Rcd 7297 (1991). *See also*, Memorandum Opinion and Order, 8 FCC Rcd 6690 (1993).

[2] Section 90.631(f) reads, in pertinent part:

> If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission.

Section 90.629 relates to extended implementation schedules for local governments and other special systems that are not at issue in this case.

[3] Order, 9 FCC Rcd 225 (1994).

[4] Letter to Lloyd W. Coward, Esquire and Catherine M. Withers, Esquire from William H. Kellett.

tion of the station.[5] Rule violations at distances less than 1.6 km do not lend themselves to conclusive and expeditious action because issues of method of measurement, intent, justifiable reliance, credibility, and good faith arise. *See, e.g., In re Applications of Eugene Walton et al.*, 6 FCC Rcd. 6071 (1991)(para. 4); *In re Brownfield Broadcasting Corp.*, 93 FCC 2d 1197 (1982)(para. 6).

9. We have chosen the 1.6 kilometer benchmark because in other contexts in Part 90 we treat sites located within 1.6 km of specified coordinates as being at those coordinates. *See e.g.*, 47 C.F.R. § 90.621(b)("[A]ll locations within 1.6 km (1 mi) of the coordinates [listed] will be considered to be at that site").[6] The objective guideline we are adopting today will allow persons preparing finder's preference requests to reasonably predict the outcome of their requests and will expedite the processing of these requests.

10. In interpreting the burden of proof in this fashion, we are limiting the availability of finder's requests as the Commission directed to violations that lend themselves to conclusive and expeditious action. We are also cognizant of the important public policy concerns implicated, such as the fact that construction costs associated with a trunked Specialized Mobile Radio Station can amount to hundreds of thousands of dollars. Additionally, the communications service provided to the public will be adversely affected if we begin cancelling stations for minor discrepancies from authorized coordinates. We, however, must balance these concerns with the fact that stations operating at unauthorized locations impact on the integrity of our channel reuse program.

11. For the above reasons, IT IS ORDERED THAT the finder's preference request made by Lawrence E. Vaughn, Jr. for Station WNXE819 licensed to Ross Shade Trust pursuant to 47 C.F.R. § 90.173(k) is denied.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

[5] Licensees are still responsible for providing accurate coordinates to the Commission, and nothing herein relieves the Shade Trust from filing a modification application.

[6] Further, it is likely that a licensee who builds more than 1.6 km (1 mi) from its authorized coordinates could have more accurately determined the correct coordinates using a standard topographical map.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 18, 1994

Mr. Emmet "Jay" Kitchen
National Association of Business
and Education Radio, Inc.
Suite 200
1501 Duke Street
Alexandria, VA 22314

Mr. Mark E. Crosby
Industrial Telecommunications
Association, Inc.
Suite 500
1110 N. Glebe Road
Arlington, VA 22201

Mr. Ronnie Rand
Association of Public-Safety
Communications Officials-International, Inc.
2040 S. Ridgewood Avenue
South Daytona, FL 32119

Dear Messrs. Kitchen, Crosby and Rand:

On August 9, 1994 the Commission adopted the *Third Report and Order* in the Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252. In the associated News Release (Report No. DC-2638), the Commission announced that "in light of the changes to be implemented in 800 MHz licensing, acceptance of new 800 MHz SMR applications (including SMR applications for General Category channels) will be suspended, effective immediately, until new licensing rules are adopted."

As a consequence of this decision, the National Association of Business and Education Radio, Inc. (NABER), the Industrial Telecommunications Association, Inc. (ITA) and the Association of Public-Safety Communications Officials-International, Inc. (APCO) may no longer accept applications from SMR applicants for the coordination of 800 MHz General Category frequencies or from SMR applicants for 800 MHz Business and Industrial/Land Transportation frequencies through inter-category sharing. Any such applications received by NABER, ITA, or APCO after August 9, 1994 should be returned to the applicant.

Sincerely,

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules
to Establish New Personal Communications
Services in the 2 GHz Band

FURTHER ORDER ON RECONSIDERATION

Adopted: July 22, 1994; Released: July 22, 1994

By the Commission:

1. In the Commission's *Memorandum Opinion and Order* in this proceeding, FCC 94-144 (released June 13, 1994) ("*Memorandum Opinion and Order*"), we reaffirmed our bright-line cross-ownership attribution standards, which apply to common ownership of licenses in the Domestic Public Cellular Radio Telecommunications Service ("cellular") and the Personal Communications Services in the 2 GHz band ("broadband PCS"). We also ruled that no entity would be permitted to hold broadband PCS licenses comprising more than 40 MHz of spectrum in a particular PCS service area. The purpose of both the broadband PCS/cellular cross-ownership rule and the broadband PCS spectrum cap rule is to ensure that broadband PCS licensees lack any incentive to impede the development of full competition with the cellular licensees or with other broadband PCS licensees in the same geographic area.

2. We determined that an interest of 20 percent or more in a cellular license will be attributable,[1] and that an interest of 5 percent or more in a broadband PCS license will be attributable. *See Memorandum Opinion and Order* at ¶ ¶ 109-110. Under the broadband PCS/cellular cross-ownership rule, entities with attributable ownership of a cellular license covering 10 percent or more of the population of a broadband PCS service area are limited to holding one 10 MHz broadband PCS license in that broadband PCS service area until January 1, 2000. *See* 47 C.F.R. § 24.204. Under the broadband PCS spectrum cap rule, parties are not permitted to hold attributable interests in licenses covering more than 40 MHz in the same PCS service area. *See* 47 C.F.R. § 24.229(c). In determining how to calculate a party's interest in a cellular licensee when it is held through multiple tiers of entities, we stated that the interest of a subsidiary is attributed in full to the parent. *See Memorandum Opinion and Order* at ¶ 116. The same rule would apply to interests held in broadband PCS licenses through multiple tiers of entities.

3. Herein we reconsider, on our own motion, the issue of whether to use a "multiplier" to determine how interests in cellular and broadband PCS licensees held indirectly through intervening corporate entities should be attributed. A multiplier is currently used by the Commission in our attribution rules in the broadcast context. *See* 47 C.F.R. 73.3555, note 2(d). To determine the "true" ownership interest of a party whose interest in a broadcast licensee is held though intervening entities, each non-majority, non-controlling interest is multiplied together. For example, a party that owns a 25 percent non-controlling interest in a corporation that has a 10 percent non-controlling interest in a licensee would be deemed to have a 2.5 percent interest in the licensee. As we concluded in adopting a multiplier for broadcast attribution, use of a multiplier allows the Commission to accurately take account of a party's "actual involvement with the ultimate licensee" as well as its ability to exert control over the actions of the licensee. *See* Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 FCC 2d 997, 1018 (1984), *recon.*, 58 RR 2d 604 (1985), *further recon.*, 1 FCC Rcd 802 (1986). We concluded that "use of a multiplier would more realistically reflect a party's attenuated interest in a licensee where there are intervening corporations, than does the present practice of fully attributing any interest above the benchmark through each intervening corporation. *Id.*

4. In the *Memorandum Opinion and Order*, we favored a bright-line test because we believed that it would result in a faster, less burdensome licensing process. *Memorandum Opinion and Order* at ¶ 113. On reconsideration, however, we have concluded that adding use of a multiplier will allow us to more effectively enforce the broadband PCS/cellular cross-ownership and broadband PCS spectrum cap rules consistent with their intent. We also conclude that using a multiplier is consistent with our policy goal of promoting full competition in wireless markets, because it will not cause the exclusion of firms that pose no threat to competition. Without a multiplier, parties that have neither the ability to exert control nor a substantial financial stake in the cellular or broadband PCS license could be unduly restricted in acquiring interests in such license. Furthermore, absent a multiplier, anomalous and unintended results occur. For example, if Company A holds a 21 percent non-controlling interest in Company B, which in turn holds a 30 percent non-controlling interest in Company X, a cellular licensee, Company A's attributable interest in Company X would be deemed to be 30 percent, in excess of the 20 percent threshold applicable to broadband PCS/cellular cross-ownership. Company A would thus be limited to acquiring a 10 MHz broadband PCS license in Company X's cellular service area, even though it has neither the ability to exert control or significant influence over the operations of Company X's cellular system nor a financial stake in Company X so substantial as to give rise to an incentive to engage in anticompetitive conduct. In comparison, by using a multiplier, Company A's attributable interest in Company X would be 6.3 percent (0.21 x 0.3), under the 20 percent attribution threshold, and Company A would not be restricted to 10 MHz broadband PCS licenses in Company X's cellular service area.

[1] Certain entities are permitted to hold up to a 40 percent interest in a cellular license without attribution. *See* 47 C.F.R. § 24.204(d)(2)(ii).

5. Considerations of "actual involvement" with, true economic interest in, and ability to control a licensee are crucial in determining whether a particular indirect ownership interest should be attributed to the holder for purposes of our cross-ownership and multiple ownership rules. These considerations apply with equal force in the broadcast, broadband PCS and cellular contexts; thus, we conclude that a multiplier similar to that used in applying our attribution rules in the broadcast area should be adopted for purposes of determining attributable interests in cellular and broadband PCS licensees. We therefore will amend Section 24.204 of our Rules to include use of a multiplier to determine whether an entity holding indirect non-controlling interests in a cellular licensee or a broadband PCS applicant or licensee has an attributable interest for purposes of our broadband PCS/cellular cross-ownership rule and our broadband PCS spectrum cap rule. For purposes of applying the multiplier, where an entity's ownership interest in any particular link in the ownership chain is greater than 50 percent or is controlling, the interest will be treated as if it were 100 percent.

6. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules is amended as set forth in the attached Appendix A.

7. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

FINAL RULES

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.204 of the Commission's Rules is amended by adding subparagraph (d)(2)(viii):

§ 24.204 Cellular eligibility

(d) * * *

(2) * * *

* * * * *

(viii) Ownership interests in a cellular licensee or a broadband PCS applicant or licensee that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 10 percent of Company X, which owns 35 percent of, and controls, Company Y, which owns 25 percent of Licensee, then Company X's attributable interest in Licensee would be 25 percent, and A's attributable interest in Licensee would be 2.5 percent (0.1 x 0.25).]

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BLINN COLLEGE File No. BPLIF-911219DH
Bryan, TX

BUFFALO INDEPENDENT SCHOOL DISTRICT File No. BPLIF-911230DI
Bremond, TX

For Construction Permit and
License in the Instructional
Television Fixed Service on
Channels D1, D2, D3, and D4

ERRATUM

Released: August 26, 1994

The Commission released a Memorandum Opinion and Order, FCC 94-135, on July 7, 1994 in the above-captioned proceeding. The vote line in said document is corrected to read "By the Commission: Commissioners Ness and Chong not participating."

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Miss Shell Seafood Company
New Smyrna Beach, Florida

NAL/Acct. No. 315PS0016

ORDER

Adopted: August 15, 1994; Released: August 26, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-665, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Miss Shell Seafood Company. The Order responding to the Petition for Reconsideration reduced the NOF to $1,600. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Miss Shell Seafood Company. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one thousand six hundred dollars ($1,600) against Miss Shell Seafood Company for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Robert V. Crow NAL/Acct. No. 315KI0072
Corpus Christi, Texas

ORDER

Adopted: August 15, 1994; Released: August 26, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 17, 1994, DA 94-663, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Robert V. Crow. The Order responding to the Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 17, 1994, Order issued to Robert V. Crow. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 17, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of two thousand dollars ($2,000) against Robert V. Crow for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Donald D. Bishop NAL/Acct. No. 315SF0041
Fort Bragg, California

ORDER

Adopted: August 15, 1994; Released: August 26, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-676, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Donald D. Bishop. The Order responding to the Petition for Reconsideration reduced the NOF to $100. This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Donald D. Bishop. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one hundred dollars ($100) against Donald D. Bishop for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jan Lane, Inc. NAL/Acct. No. 315BE0014
Fairhaven, Massachusetts

ORDER

Adopted: August 15, 1994; Released: August 26, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-672, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Jan Lane, Inc. The Order responding to the Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Jan Lane, Inc. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of two thousand dollars ($2,000) against Jan Lane, Inc. for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION SYSTEMS CORPORATION — File No. 1097-DSE-MISC-94

Request for Declaratory Ruling
Concerning Section 310(b)(4)
of the Communications Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1994; Released: August 26, 1994

By the Chief, Domestic Facilities Division:

1. Cablevision Systems Corporation (Cablevision) requests a declaratory ruling that Mr. Barry J. O'Leary, a citizen of Canada, can serve as Senior Vice President - Finance and Treasurer of Cablevision and its subsidiaries other than those directly holding common carrier or broadcast licenses. Cablevision argues that such a ruling would be in the public interest under Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4). In addition, Cablevision requests a ruling that the appointment of Mr. O'Leary as a corporate officer of Cablevision subsidiaries or affiliates other than those directly holding common carrier or broadcast licenses or acting as general partners of common carrier or broadcast licenses would be consistent with the public interest under Section 310(b)(4) of the Communications Act. Cablevision's "request was placed on public notice on April 27, 1994."[1] No comments were filed. For the reasons discussed below, we find, pursuant to Section 310(b)(4), that the appointment would not adversely impact the public interest.

2. Cablevision is a publicly held, multifaceted corporation which operates, directly and through its affiliates, cable systems. Through is subsidiary Rainbow Programming Holdings, Inc., Cablevision owns significant interests in national and regional cable programming services. Another subsidiary of Cablevision furnishes telecommunications services. Cablevision also holds experimental licenses to construct and operate personal communications facilities.

3. Although Cablevision itself does not directly hold any common carrier or broadcast licenses, certain of its affiliates do. A Cablevision subsidiary is the general partner of CV Radio Associates, L.P., licensee of WKNR(AM), Cleveland, OH. Cablevision plans to appoint Barry J. O'Leary, a citizen of Canada, as Senior Vice President - Finance and Treasurer. Mr. O'Leary would not be a corporate officer of any affiliate that directly holds common carrier or broadcast licenses.

4. Section 310(b)(4) of the Communications Act provides that broadcast and common carrier radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation or which any officer or more than one-fourth of the directors are aliens. . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

5. The restrictions of Section 310(b)(4) reflect national security concerns and are designed to prevent the participation of aliens in certain domestic radio activities.[2] Nevertheless, it is within the Commission's discretion to allow a foreign national to serve as an officer of a parent corporation if such an appointment will not adversely affect the public interest.[3]

6. Cablevision represents that Mr. O'Leary has been appointed Senior Vice President -- Finance and Treasurer of Cablevision. Cablevision states that Mr. O'Leary will not exercise supervision or control over the day-to-day management or operations of any licensed common carrier or broadcast facility or entity, from which Mr. O'Leary would be removed by one or more corporate levels. Also, Mr. O'Leary will be one of only ten officers of Cablevision and all other officers are U.S. citizens. Further, Cablevision states that Mr. O'Leary will be supervised by Cablevision's Vice President, William J. Bell, and Cablevision's Chairman and CEO, Charles F. Dolan, both of whom are U.S. citizens, and by a Board of Directors which is comprised entirely of U.S. citizens. Finally, Mr. O'Leary has affirmed that he will recuse himself from any and all involvement in the handling or management of the finances of broadcast radio station WKNR(AM), Cleveland, OH.

7. The Commission has previously ruled, in the broadcast area, that the presence of an alien officer in a parent organization is consistent with the public interest when that officer will be insulated from a subsidiaries commission-regulated activities (*see, e.g., Tribune Co.*, 47 FCC 2d 522 (1974)). In light of this and other facts set forth in Cablevision's request, we find that the appointment of Mr. O'Leary as Senior Vice President -- Finance and Treasurer would not require the revocation of the common carrier or broadcast licenses held by Cablevision's subsidiaries and affiliates.

8. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Cablevision Systems Corporation's request for a declaratory ruling IS GRANTED, and the Commission has no legal objection under Section 310(b)(4) of the Communications Act, 47 U.S.C. §310(b)(4), to the continued appointment of Barry J. O'Leary as Senior Vice President -- Finance and Treasurer of Cablevision Systems Corporation.

---

[1] Public Notice, Report No. DS-1416 (April 27, 1994).

[2] *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 FCC 2d 511, 516-517 (1985), *recon.*, 1 FCC Rcd 12 (1986).

[3] *See* International Telephone and Telegraph Corp., 67 FCC 2d 604 (1978); Contel Corporation, 3 FCC Rcd 5795 (Dom. Fac. Div. 1988).

9. IT IS FURTHER ORDERED that this declaratory ruling is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation AAD 94-29
on behalf of
Texas ALLTEL, Inc.
and
ALLTEL Texas, Inc.

Petition for Waiver of the
Definition of "Study Area"
contained in Part 36, Appendix-
Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1994; Released: August 26, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On February 28, 1994, ALLTEL Service Corporation ("Petitioner"), on behalf of its telephone affiliates Texas ALLTEL, Inc. ("Texas-ALLTEL") and ALLTEL Texas, Inc. ("ALLTEL-Texas") filed a petition for waiver of the definition of "Study Area" to consolidate both companies into one operating entity.[1] This waiver would allow Texas-ALLTEL to change its study area boundary as a result of its merger with ALLTEL-Texas. Texas-ALLTEL would be the surviving corporation. In this Order we grant the waiver. We placed this petition on public notice March 16, 1994.[2] We received comments supporting the petition from two parties, the National Exchange Carrier Association, Inc. and the United States Telephone Association. At the request of Bureau staff, the Petitioner provided additional information concerning the petition on April 18, 1994.[3] The Petitioner also submitted a copy of the Order of the Public Utility Commission of Texas ("PUCT"),[4] which approved the merger between Texas-ALLTEL and ALLTEL-Texas.

2. Texas-ALLTEL is a telephone company with 26 exchanges serving approximately 18,000 access lines in rural areas of Texas. ALLTEL-Texas is a telephone company with 5 exchanges serving approximately 2,800 access lines that are also in a predominately rural area of Texas. Both of these companies are currently cost companies for purposes of interstate access settlements.[5]

3. A study area is a geographical segment of a carrier's telephone operation. Generally, a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. A carrier performs its jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[6] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[7] The Commission has three primary concerns in considering study area boundary change petitions: first, that the change not affect adversely the Universal Service Fund ("USF") support program;[8] second, that the state commission(s) having regulatory authority have no objection to the change;[9] and finally, that the public interest strongly support grant of the waiver.

II. PETITION AND PLEADINGS

4. The Petitioner seeks a waiver to consolidate ALLTEL-Texas study area with that of Texas-ALLTEL. The Petitioner states that the requested waiver will not undermine the aforementioned Commission concerns.[10] The Petitioner also states that the merger will promote the public interest through more cost effective service flowing from improved operating efficiencies in the areas of maintenance and administration. [11]

5. The PUCT states that any operational changes will be transparent with respect to customers' rates and services.[12] The PUCT states that combining the financial and human resources of both companies should further improve service quality and result in lower capital costs for Texas-ALLTEL.[13]

---

[1] ALLTEL Service Corporation on behalf of its affiliates Texas ALLTEL, Inc. and ALLTEL Texas, Inc. filed a Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules ("Petition").

[2] Public Notice, 9 FCC Rcd 1384 (Com. Car. Bur.1994).

[3] Letter from ALLTEL Service Corporation dated April 18, 1994 ("April 18 Supplement").

[4] Public Utility Commission of Texas Order, Docket No. 12441, dated June 9, 1994 ("PUCT Order").

[5] "Cost companies" are those exchange carriers that receive compensation for the use of their facilities in originating and terminating interstate telecommunication services on the basis of their actual cost characteristics.

[6] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Recommendation*), adopted by Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*Order Adopting Recommendations*).

[7] 47 C.F.R. Part 36, Appendix-Glossary.

[8] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[9] *See generally* Amendment of part 36 of the Commission's Rules and Establishment of a Joint Board, CC docket no. 80-286, Notice of proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on the study area changes.

[10] Petition at 3.

[11] *Id.* at 2.

[12] PUCT Order at 4.

[13] *Id.* at 5.

III. DISCUSSION

6. The Petitioner states that the consolidation of Texas-ALLTEL and ALLTEL-Texas would result in more cost efficient service with improved operating efficiencies. The Petitioner also states that any operational changes will not adversely affect any customer's rates or service. No party to this proceeding has contended that either of these statements are inaccurate, or otherwise incorrect, and there is no other information of record that would call those representations into question.

7. The combined study area will contain approximately 20,000 access lines. Texas-ALLTEL estimates that in 1994 it would receive $5,392,940 and ALLTEL-Texas would receive $265,791 in USF support for the existing study areas, for a total of $5,658,731.[14] Texas-ALLTEL estimates that the consolidated study area would receive USF support of $5,644,392. As a consequence, USF support payments would be reduced by $14,339 if the estimates are correct. Our independent analysis, as well as the absence of opposing comments, lead us to conclude that the merger of these study areas will not have an adverse, unwarranted, effect on the USF.

8. On August 16, 1994, ALLTEL filed a supplement to its petition for waiver.[15] In that supplement, ALLTEL states that the PUCT approved its application on June 9, 1994 with an effective date of January 1, 1994. ALLTEL requests that its study area waiver request be made effective January 1, 1994. In support of that request, ALLTEL states that the retroactive approval to January 1, 1994 will permit the $14,399 annual reduction in USF as well as a $50,000 reduction in annual interstate revenue requirements to begin at the earliest possible date.[16] We believe that ALLTEL has shown good cause for the requested retroactive effective date of January 1, 1994, and accordingly grant that request.[17]

9. We conclude, based upon the record before us as a whole, that the Petitioner has made the necessary showings that granting the requested waiver petition would be in the public interest and would not adversely effect the USF. In addition, because the PUCT has approved the merger as being in the public interest, we conclude that the petition should be granted.

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the petition of ALLTEL Service Corporation, on behalf of its affiliates Texas ALLTEL, Inc. and ALLTEL Texas, Inc., for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[14] April 18 Supplement. Texas-ALLTEL receives $5,392,940 and ALLTEL-Texas receives $265,791.

[15] Letter from Carolyn C. Hill, ALLTEL Federal Regulatory Counsel, to William F. Caton, Acting Secretary, Federal Communications Commission, dated August 3, 1994, with attachment ("Letter from C. Hill").

[16] Letter from C. Hill.

[17] *See id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 26, 1994

BELL ATLANTIC TELEPHONE COMPANY FILES PETITION FOR WAIVER OF SECTION 32.27 OF THE COMMISSION'S RULES

PUBLIC COMMENT INVITED

On August 2, 1994 Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Section 32.27 of the Commission's rules. These rules set forth the terms under which local exchange carriers may engage in transactions with their affiliated companies. Bell Atlantic requests a waiver of these rules to allow it to engage in affiliate transactions under terms that are not provided for under the rules.

Parties may file comments on Bell Atlantic's petition for waiver no later than September 30, 1994. Replies should be filed by October 15, 1994. Comments should reference AAD 94-107. A copy of each pleading should be sent to Kim Yee, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Kim Yee at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 19, 1994

Released: August 26, 1994

Continental Cablevision
c/o Alan D. Mandl, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110-3319

Dear Mr. Mandl:

This letter is in response to the request of Continental Cablevision ("Continental"), dated July 8, 1994, that the Commission clarify or waive its regulations so that the Commonwealth of Massachusetts Community Antenna Television Commission ("CATC"), Continental's franchising authority, may issue rate orders after September 1, 1994 concerning Continental's basic rates in effect through July 14, 1994 for the communities of Billerica, Burlington, Cambridge, Eastham, Orleans, Provincetown, Stoneham, Truro, Wellfleet, Wilmington, Bernardston, Chester, Conway, Deerfield, Huntington, Northfield, Springfield, Sunderland and Westhampton ("Franchises"), and order refunds, if any, with interest as provided by law, for the period of time between September 1, 1993 and July 14, 1994. The parties have agreed, however, that if the CATC does not issue final rate orders in these proceedings on or before December 31, 1994, the maximum refund liability period will be reduced on a day-for-day basis commencing January 1, 1995 and continuing until final decisions are rendered by the CATC. The parties have agreed that if the CATC issues final rate orders with regard to the Franchises after September 1, 1994, refunds, if any, may be ordered as described above. In a letter dated July 12, 1994, the CATC endorsed Continental's request for clarification or waiver of the Commission's rules as being in the best interests of subscribers and all interested parties.

This letter confirms the Commission's approval of the above-described agreement between Continental and the CATC. Continental's potential refund liability period shall extend back to September 1, 1993 in the event that the CATC does not conclude its rate proceedings by September 1, 1994 with regard to the basic rates in effect through July 14, 1994 within the Franchises. However, in order to avoid a reduction in Continental's refund liability period, the CATC must conclude the rate proceedings for the Franchises by December 31, 1994.[1] We consent to this arrangement because it appears that the arrangement serves to further protect subscribers' interests in potential refunds. We strongly encourage full cooperation among the parties in order that subscribers may receive the benefits of cable service rate regulation as soon as possible.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: Acting Commissioner Jill M. Reddish

[1] Continental has requested clarification of whether the instant request to the Commission would be necessary in this type of situation in a future proceeding, or whether the voluntary agreement of Continental, consented to by the CATC, would be sufficient. We believe that extensions of cable operators' refund liability periods beyond the maximum one year period specified in § 76.942 of the Commission's rules may be agreed to by the involved parties without advance Commission approval. We do, however, encourage cable operators and franchising authorities to make written records of such agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 19, 1994

Released: August 29, 1994

IN REPLY REFER TO:
1800C1-MD
94040180
94040951

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Southern Nevada Radio, Inc., D.I.P.
Licensee, KKLZ(FM), Las Vegas, NV
4305 S. Industrial Road
Las Vegas, NV 89103

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

The Commission has received information indicating that Radio Station KKLZ(FM), Las Vegas, NV, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the "Johnson and Tofte Morning Show" on March 2 and March 16, 1994, between 6 a.m. and 10 a.m. A transcript of the allegedly indecent broadcasts, taken from a tape submitted by the complainant, is attached.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *See Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We believe that the subject excerpts are indecent in that they contain language that describes sexual and excretory activities or organs in patently offensive terms. The March 2nd passage contains an explicit, unambiguous reference to anal sex and sexual sound effects which, in context, are pandering in nature. Taken together, these characteristics give the metaphoric language of the song an inescapable sexual meaning. *Compare, e.g., Cox Enterprises, Inc.*, 6 FCC Rcd 3704 (MMB 1989) ($10,000 Notice of Apparent Liability for five indecent broadcasts on WIOD(AM), Miami, FL, including the rap song "Candy (W)rapper"). The March 16th passage contains multiple explicit references to excretory and sexual functions in the context of a program segment -- "Men Are Pigs" -- that describes and emphasizes base conduct and contains gratuitous comment, including a discussion of whether a female caller had "squirted him [her ex-husband] with [her] . . . breast milk," which contributed to a pandering manner of presentation. *Compare, e.g., KFI, Inc.*, 6 FCC Rcd 3699 (MMB 1989) ($6,000 Notice of Apparent Liability for three indecent broadcasts on KFI-AM, Los Angeles, CA, including call-in "confessions" addressing bizarre sexual behavior). Because the material aired at times when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on March 2 and March 16, 1994, Station KKLZ(FM) violated 18 U.S.C. § 1464 by airing indecent programming.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Southern Nevada Radio, Inc., D.I.P., is hereby advised of its apparent liability for a forfeiture of Eight Thousand Dollars ($8,000), for its apparent violation of 18 U.S.C. § 1464 on March 2 and March 16, 1994. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

The March 2, 1994, broadcast is similar in nature to WIOD's broadcast of the "Candy (W)rapper" song, for which we assessed the maximum monetary penalty allowed per violation ($2,000) under the then applicable statute. The March 16, 1994, broadcast is similar in nature to the KFI-AM broadcast discussed above, for which we also assessed the maximum monetary penalty per violation allowed at the time. While these similarities might suggest that a forfeiture of $2,000 per violation would be appropriate, a separate countervailing consideration leads us to increase the per violation penalty assessed here, compared to those assessed in the earlier cases. Specifically, in the time since our decisions in WIOD and KFI, Congress has amended Section 503(b) of the Act[1] to increase our maximum forfeiture authority from $2,000 per violation to $25,000 per violation, finding that the smaller amount might no longer serve as a meaningful sanction to wrongdoers or as a deterrent to others.[2] The amount we have assessed here reflects the intent of this amendment by increasing the penalty to a level ($8,000) that we believe will, in the circumstances of this case, provide a reasonable yet effective sanction and deterrent. We do not believe that a higher forfeiture is necessary or appropriate, given the limited scope of the apparent misconduct involved.[3]

---

[1] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989).

[2] *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[3] In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the court set aside our *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), in which we had established guidelines for determining

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Attachments

KKLZ(FM), Las Vegas, Nevada
Excerpts from Johnson and Tofte Morning Show (6-10 a.m.)

MV: Male Voice
MV2: Second Male Voice
FV: Female Voice
FC: Female Caller

March 2, 1994

MV: Hey, Mister, tell us about anal sex.

MV2: (Toy train whistle). Oh look, there's the chocolate train going round and round the candy track. Soon it will stop and a special passenger will get off.

FV: Oh, God.

(Lilting tune begins, sung by female voice, as if for small children)

The chocolate train rides on the candy track.
The lollipop wheels go clickity, clickity, clack.
The peppermint whistle goes toot-toot
on the chocolate train.

The little train is on its way
to climb up ice cream mountain.
It takes on water for its trip
from a great big soda fountain.

The chocolate train* rides on the candy track.
The lollipop wheels go clickity, clickity clack.
Take a trip to candy land
on the chocolate train.

* Background female climactic moans and groans begin here, ending song with panting and moaning "Yes, Oh God, yes, oh yes, yes, yes, yes, oh."

March 16, 1994

MV: Well, the name "Interior Decorator" brings a lot of things to mind, but this is a real Interior Decorator. You know, men are pigs. The best of Johnson and Tofte on KKLZ.

M2: It's only a morning show.

MV: Yes they are, huh?

M2: Oh boy.

MV: You haven't heard a "men are pigs" story til you've heard this one, right?

M2: Johnson and Tofte, go ahead.

FC: Hi, I'm calling about the "men are pigs" story.

MV: Right, what's your name?

FC: Linda.

MV: Hi, Linda.

FC: Hi.

MV: Are you single or married?

FC: Uh, single.

MV: Alright. Let's hear your "men are pigs" story.

FC: Okay. I was married for 18 years, and I call my "ex" Sybil.

MV: Oh, well.

FC: I had to have him evicted from the house because he wouldn't leave, and I was paying on the house when I wasn't living there. So, before he left, he decided that I should remember his being evicted from the house. I didn't know that a man had that much bodily fluids in him. So, he decided to spit on all the windows.

M2: Oh, my God.

FC: And he urinated all over the drapes and the sofa.

MV: Oh.

FC: And he apparently must have been watching something exciting because he ejaculated all over the furniture.

M2: (Sound of vomiting).

FC: I was (Unintelligible) before this furniture stayed nice and clean.

MV: Oh, my God!

---

appropriate forfeiture amounts for violation of various Commission rules and statutory provisions, including the indecency prohibition. In assessing this forfeiture, therefore, we have undertaken to apply directly the statutory factors in Section 503(b) to the particular facts of this case, giving due consideration to relevant intervening legislative changes and to our past decisions that predated the *Policy Statement*.

M2: So you squirted him with breast from breast milk.

FC: No milk coming from these breasts. Not with him.

MV: Well, it would have been an idea.

FC: And then at the sign of coup de gras with dust ruffle, he decided to do a bowel.

M2: Ah, do we even want to hear this?

MV: Not on the ruffle thing!

FC: On the dust ruffle, and used it as toilet paper.

MV: Ah, come on.

FC: I'm not kidding, I was so upset I brought the couch cushion in a plastic bag into the court room for the judge to see. (Laughter).

MV: And you divorced this man? I just. (Laughter in the background).

FC: He was a plumber.

MV: He sure was, and it sounds like he let one of his pipes leak.

FV: He sure did.

MV: Alright hang on, you're goin' to this show. (Laughter).

FC: Thank you.

MV: So, this actually happened and you brought it to court?

FC: Oh yeah. The judge didn't want to see the couch cushion with all the white stains.

MV: Was the judge laughing about it at all.

FC: No, I don't think he was too happy.

M2: Gee. What happened to your "ex" then?

FC: Well, he decided, and so he took my car from me and he offered me a plumbing van. (Laughter). Rather than my car, he had four plumbing vans. But needless to say, it took three years to get divorced from this psychotic.

MV: Did you guys have kids together?

FC: No, thank God.

M2: Ah man, he needs diapers made out of dust ruffles. (Laughter).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Local Exchange Carriers'	AAD Nos. 92-22
Permanent Cost Allocation	through 92-35
Manuals for the Separation	
of Regulated and Nonregulated Costs	

MEMORANDUM OPINION AND ORDER

Adopted: August 22, 1994; Released: August 29, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 7, 1993, the Common Carrier Bureau ("Bureau") released an Order[1] that addressed issues regarding the treatment of directory publishing operations. The Bureau determined, among other things, that: (1) the publication of yellow pages directories is a nonregulated activity; (2) a carrier's cost allocation manual ("CAM") need not list the compiling, publishing, and delivering of yellow pages directories as affiliate transactions when the carrier's affiliate performs those functions on its own behalf; (3) revenue received by a carrier's affiliate for the publication of yellow pages directories should not be recorded in the carrier's Part 32 accounts;[2] and (4) if a carrier provides services to its directory publishing affiliate and receives compensation in excess of the fully distributed cost of providing such services, it may record all such revenues in its Part 32 accounts.

2. On June 5, 1993, the Public Staff - North Carolina Utilities Commission ("North Carolina") filed a Petition for Reconsideration ("petition") of the *Yellow Pages Order*. North Carolina claims that the Bureau's positions on certain issues are inconsistent with the Commission's affiliate transaction rules. North Carolina argues that the publication of yellow pages directories by a carrier's affiliate is an affiliate transaction with the carrier under the Commission's rules and should be listed as such in the carrier's CAM. North Carolina also requests that a carrier be required to record, in its Part 32 accounts, the difference between the total directory revenue and the affiliate's fully distributed cost ("FDC")[3] of providing directory services. One party filed comments in support of North Carolina's petition and six parties submitted oppositions. North Carolina and one other party filed replies.[4] For the reasons set forth below, we deny North Carolina's petition.

II. BACKGROUND

3. In the *Joint Cost Order*,[5] the Commission required carriers with $100 million or more in annual operating revenue to file CAMs describing the methods they use to separate the costs of regulated telecommunications services from the costs of nonregulated activities. These CAMs must describe each of the carriers' nonregulated activities and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. The Commission's rules require each CAM to identify each affiliate that engages in or will engage in transactions with the carrier and to describe the nature, terms, and frequency of the transactions.[6]

III. PLEADINGS

4. North Carolina and Tennessee contend that the publication of yellow pages directories by a carrier's affiliate should be subject to the Commission's affiliate transaction rules because they characterize yellow pages publication as a service the directory affiliate provides the carrier. They argue that this service should be listed in the carrier's CAM as an affiliate transaction, provided at the affiliate's FDC and recorded on that basis in the carrier's regulated accounts. These parties maintain that a carrier should also record as regulated revenues the difference between the total directory revenues received by the affiliate and the affiliate's FDC.[7] To justify this accounting, North Carolina and Tennessee suggest that the Commission classify the publication of yellow pages directories as a public utility function for federal accounting purposes, with the revenues assigned fully to the intrastate jurisdiction. They contend that the publication of yellow pages directories, like the publication of white pages directories, is necessary for the provision of adequate regulated telephone service. They also assert that in most states white pages and yellow pages are published in one directory. Finally, they argue that if a

---

[1] *Local Exchange Carriers' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs*, 8 FCC Rcd 3105 (Com. Car. Bur. 1993)(*Yellow Pages Order*).

[2] 47 C.F.R. Part 32.

[3] Fully distributed cost for this purpose is determined by applying the standards and procedures for apportionment of joint and common costs prescribed in Section 64.901 of the Commission's rules, 47 C.F.R. §64.901.

[4] The Public Utility Commission of Tennessee Staff ("Tennessee") filed the supporting comments. The Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Telecommunications, Inc. ("BellSouth"), GTE Service Corporation and affiliated domestic telephone operating companies ("GTE"), Southwestern Bell Telephone Company ("SWB"), United and Central Telephone Companies ("United"), and the United States Telephone Association ("USTA") filed the oppositions. BellSouth and North Carolina filed the replies.

[5] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Recon. Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Recon. Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[6] *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order*, CC Docket No. 90-623, 6 FCC Rcd 7571, 7641-43 (1991) (*adopting Section 64.903 of the Commission's Rules*), *petitions for recon. pending*.

[7] North Carolina Petition at 3-5, 7-8; North Carolina Replies at 1-2.

carrier provides a service to its directory affiliate, it should not be allowed to book revenues in excess of its cost of providing that service.[8]

5. USTA and the five carriers that filed comments disagree with North Carolina and Tennessee. They contend that the *Joint Cost Order* and the *U S West Order*[9] classified yellow pages publication as a nonregulated activity. They state that the Commission's affiliate transactions rules[10] do not apply to the nonregulated operations of a carrier's nonregulated affiliate.[11] They also contend that North Carolina errs in assuming that the directory affiliate publishes yellow pages directories for the carrier. They maintain that the directory affiliate publishes yellow pages directories on its own behalf. Thus, they view a nonregulated affiliate's sale of advertising in yellow pages directories to be a service provided to unaffiliated third parties. They maintain that the revenues and costs associated with this activity should be recorded on the affiliate's books and not on the carrier's books.[12] Finally, they argue that the accounting treatment for yellow pages activities sought by North Carolina would require an amendment to the Commission's rules, which is beyond the scope of this proceeding.[13]

IV. DISCUSSION

6. Simply stated, North Carolina and Tennessee assert that yellow pages publishing is a telephone carrier activity. Consequently, when an affiliate of a regulated carrier engages in this activity, it engages in an affiliate transaction with the carrier. The Commission, however, does not require a *carrier* to publish a yellow pages directory, and neither North Carolina nor Tennessee has presented evidence of any such state requirement. We, therefore, conclude that because holding companies may structure their organizations so that a yellow pages affiliate conducts this activity on its own behalf, an affiliate's publication of yellow pages directories does not constitute an affiliate transaction with the carrier. Accordingly, we affirm our holding that carriers are not required to list this activity in the affiliate transactions section of the CAM.

7. Furthermore, the accounting treatment for revenues derived from an affiliate's provision of yellow pages directory publishing services requested by North Carolina and Tennessee is inconsistent with our accounting rules. The revenues associated with the publication of yellow pages directories by an affiliate may not be recorded on the carrier's books. States, however, may have the authority to impute revenues related to affiliate publishing of yellow pages directories for state ratemaking purposes. If they have such authority, states must exercise this authority without the use of Part 32 accounts.

8. Finally, North Carolina has provided no evidence that would justify reconsideration of our decision in the *U S West Order* to permit a carrier to book revenues in excess of its FDC for services provided to a directory affiliate. Pursuant to this ruling, a carrier may book additional revenues from a directory publishing affiliate without a waiver of the affiliate transaction rules. In that event, however, a carrier must state in its CAM that it recovers its FDC from its directory publishing affiliate and that any additional payment represents a subsidy.[14]

V. OTHER ISSUES

9. In their comments, Tennessee and Bell Atlantic seek reconsideration of other aspects of the *Yellow Pages Order*. Because Tennessee and Bell Atlantic did not present these challenges in timely petitions for reconsideration, we decline to address them in this proceeding.

VI. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, That North Carolina's Petition for Reconsideration is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

---

[8] North Carolina Petition at 3, 11-12; Tennessee Comments at 6-8.

[9] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 481 (Com. Car. Bur. 1989)(*U S West Order*).

[10] 47 C.F.R. §32.27.

[11] SWB Comments at 2-4; United Comments at 4-6; USTA Comments at 2.

[12] Bell Atlantic Comments at 1-4; BellSouth Comments at 2-5; United Comments at 7; USTA Comments at 2-4.

[13] GTE Comments at 2-6; SWB Comments at 4-6; USTA Comments at 3-4.

[14] *See U S West Order*, 4 FCC Rcd at 485, para. 42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Impac Protection Services
Detroit, MI

NAL/Acct. No. 215DT0013

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-673, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $20,000 to Impac Protection Services. The Order responding to the Petition for Reconsideration reduced the NOF to $12,800. This monetary forfeiture was issued for willful and repeated violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Impac Protection Services. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of twelve thousand eight hundred dollars ($12,800) against Impac Protection Services for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Signature Flight Support
Baltimore, Maryland

NAL/Acct. No. 315NY0012

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 17, 1994, DA 94-662, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $8,000 to Signature Flight Support. The Order responding to the Petition for Reconsideration reduced the NOF to $6,400. This monetary forfeiture was issued for violation of Section 301 of the Act, 47 U.S.C. §301.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 17, 1994, Order issued to Signature Flight Support. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 17, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of six thousand four hundred dollars ($6,400) against Signature Flight Support for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David J. Laing NAL/Acct. No. 215FE0145
Bellingham, Washington

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-664, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $500 to David J. Laing. The Order responding to the Petition for Reconsideration reduced the NOF to $400. This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to David J. Laing. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of four hundred dollars ($400) against David J. Laing for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-94

In the Matter of

Clarification and
Amendment of § 90.209(h)
of the Rules Regarding
the 900 MHz Emission
Mask

ORDER

Adopted: August 12, 1994; Released: August 30, 1994

By the Commission:

1. We have before us a request by Geotek Communications, Inc. (Geotek) for clarification of Section 90.209(h) of our Rules, 47 C.F.R. § 90.209(h), concerning the 900 MHz emission mask. Specifically, Geotek brought to our attention, in a letter dated April 21, 1994, and in a supplemental letter dated May 4, 1994, that the 900 MHz emission mask included in Section 90.209(h) of our Rules has the effect of restricting the use of low power digital equipment in this band. Geotek went on to point out that the restrictive effect of this rule conflicts with the Commission's intent, as stated in our *Report and Order* in GEN Docket 84-1233, 2 FCC Rcd 1825 (1986), to permit any type of modulation in this band, including digital modulation.

2. The 900 MHz band was allocated for use by the Private Land Mobile Services in 1986.[1] The regulatory structure established for this new band was designed to provide as much flexibility as possible for licensees to use a variety of technologies to satisfy their mobile communications requirements. The technology that Geotek proposes to use in this band is just the type of new technology that we had intended our flexible rules to be able to accommodate. Unfortunately, as pointed out in Geotek's letters, the emission mask for the 896-901/935-940 MHz bands has the unintended effect of precluding use of Geotek's particular technology. Very simply, the current emission mask penalizes Geotek's system because of its use of relatively low power (4 watt) portable transceivers. The emission mask currently in effect in our rules requires various levels of attenuation relative to the actual unmodulated carrier power of the transmitter, regardless of how small that transmitter power might be. For very low power transmitters, the effect of this requirement can be very severe on the design of the equipment, with no apparent corresponding benefit with respect to interference reduction. This anomaly in our rules was clearly unintended. We are, therefore, amending Section 90.209(h) of our Rules to eliminate this anomaly in the emissions mask that unintentionally restricts the use of low power digital equipment. For example, for a 4 Watt transmitter on a frequency removed 15 kHz from the channel's assigned (center) frequency, the current mask requires a relative attenuation of 71 decibels while the new mask requires only 56.

3. This rule change is being made to conform our rules to the intent stated in the text of the *Report and Order* in Docket 84-1233 at paragraph 68:

> We desire to allow as much flexibility as possible for end users to choose the equipment that best meets their needs at a cost they can afford. We want to establish appropriate incentives for the development of new technologies. However, we do not want to adopt a plan that essentially requires end users to employ one particular modulation method.... Furthermore, we want the channeling plan for this spectrum to accommodate technologies such as digital that have been developed, but require further advances to make them marketable to private land mobile users.[2]

This rule change is noncontroversial because it does not infringe on any current or potential licensee's substantive rights. Therefore, for the above stated reasons, and because this rule change is clearly in the public interest, we find good cause to conclude that notice and comment are impracticable, unnecessary, and contrary to the public interest. *See* 5 U.S.C. § 553(b)(B).

4. Accordingly, IT IS ORDERED that, effective 30 days after publication in the Federal Register, Section 90.209(h) of the Commission's Rules, 47 C.F.R. § 90.209(h) IS AMENDED as indicated in Appendix A.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile raio services

1. The authority Citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

[1] See *Report and Order* in GEN Docket No. 84-1233, 2 FCC Rcd 1825 (1986).
[2] *Report and Order* in GEN Docket No. 84-1233, 2 FCC Rcd 1825(1986) at para. 68.

2. Section 90.209 is amended by revising paragraph (h)(3), and by removing paragraph (h)(4) to read as follows:

Section 90.209 Bandwidth limitations.

*****

(h) ***

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 9.5 kHz: At least 157 Log_{10} (f_d/5.3) decibels or 50 plus 10 Log_{10} (P) decibels or 70 decibels, whichever is the lesser attenuation.

*****

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John McHenry
Seattle, Washington

NAL/Acct. No. 315FE0003

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-675, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $1,600 to John McHenry. The Order responding to the Petition for Reconsideration reduced the NOF to $100. This monetary forfeiture was issued for violation of Sections 80.102(a), 80.207(a)(1), 80.359(a) and (b), and 80.373(f) of the Commission's Rules, 47 C.F.R. §§80.102(a), 80.207(a)(1), 80.359(a) and (b), and 80.373(f).

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to John McHenry. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one hundred dollars ($100) against John McHenry for violation of Sections 80.102(a), 80.207(a)(1), 80.359(a) and (b), and 80.373(f) of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Computer, Inc.
Denver, Colorado

NAL/Acct. No. 215DV0077

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-669, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $7,000 to National Computer, Inc. The Order responding to the Petition for Reconsideration reduced the NOF to $5,600. This monetary forfeiture was issued for willful and repeated violation of Section 302(b) of the Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to National Computer, Inc. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of five thousand six hundred dollars ($5,600) against National Computer, Inc. for violation of Section 302(b) of the Act and Section 2.803 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

User Friendly Computers
Denver, Colorado

NAL/Acct. No. 215DV0078

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 20, 1994, DA 94-668, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $7,000 to User Friendly Computers. The Order responding to the Petition for Reconsideration reduced the NOF to $5,600. This monetary forfeiture was issued for willful and repeated violation of Section 302(b) of the Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 20, 1994, Order issued to User Friendly Computers. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 20, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of five thousand six hundred dollars ($5,600) against User Friendly Computers for violation of Section 302(b) of the Act and Section 2.803 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Larry Ritchie NAL/Acct. No. 315PS0003
Lakin, West Virginia

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-670, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $2,000 to Larry Ritchie. The Order responding to the Petition for Reconsideration reduced the NOF to $1,600. (We note that the Ordering clause of the Petition for Reconsideration erroneously quoted $2,000 as the forfeiture amount assessed.) This monetary forfeiture was issued for violation of Section 301 of the Act.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Larry Ritchie. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of one thousand six hundred dollars ($1,600) against Larry Ritchie for violation of Section 301 of the Act, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jinma Computer Company
Flushing, New York

NAL/Acct. No. 215CG0014

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-671, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $7,000 to Jinma Computer Company. The Order responding to the Petition for Reconsideration reduced the NOF to $5,600. This monetary forfeiture was issued for willful and repeated violation of Section 302(b) of the Act, 47 U.S.C. §302(b), and Section 2.803(b) of the Commission's Rules, 47 C.F.R. §2.803(b).

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Jinma Computer Company. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of five thousand six hundred dollars ($5,600) against Jinma Computer Company for violation of Section 302(b) of the Act and Section 2.803(b) of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Blackship Computer Systems
San Jose, California

NAL/Acct. No. 315SF0027

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 22, 1994, DA 94-701, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $5,600 to Blackship Computer Systems. The Order responding to the Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for willful and repeated violation of Section 302 of the Act, 47 U.S.C. §302, and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 22, 1994, Order issued to Blackship Computer Systems. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 22, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of five thousand six hundred dollars ($5,600) against Blackship Computer Systems for violation of Section 302 of the Act and Section 2.803 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rodney Lynn Murphy
Salem, Oregon

NAL/Acct. No. 215PO0001

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-666, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $19,000 to Rodney Lynn Murphy. The Order responding to the Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 301 of the Communications Act, 47 U.S.C. 301, and Sections 95.409(a), 95.410(a), and 95.413(a)(2) of the Commission's Rules, 47 C.F.R. §§95.409(a), 95.410(a), and 95.413(a)(2).

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to Rodney Lynn Murphy. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of nineteen thousand dollars ($19,000) against Rodney Lynn Murphy for violation of Sections 95.409(a), 95.410(a), and 95.413(a)(2) of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

William K. Schweitzer dba
Yellow Cab Co. of Palo Alto
Palo Alto, California

NAL/Acct. No. 315SF0036

ORDER

Adopted: August 15, 1994; Released: August 29, 1994

1. Pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Sections 1.80 and 0.311 of the Commission's Rules, 47 C.F.R. §§1.80 and 0.311, the Commission's Field Operations Bureau (FOB) issued an Order, adopted June 15, 1994, DA 94-674, responding to a Petition for Reconsideration of the Notice of Forfeiture (NOF) in the amount of $4,000 to William K. Schweitzer dba Yellow Cab Company of Palo Alto. The Order responding to the Petition for Reconsideration affirmed the NOF. This monetary forfeiture was issued for violation of Section 90.113 of the Commission's Rules, 47 C.F.R. §90.113.

2. In determining the forfeiture amount in this case, the Bureau followed the forfeiture standards established in the Commission's *Policy Statement, Standards for Assessing Forfeitures, (Policy Statement)*, 8 FCC Rcd 6215 (1993). On July 12, 1994, the United States Court of Appeals for the District of Columbia Circuit vacated the forfeiture standards. *United States Telephone Assn. v. FCC*, No. 92-1321 (D.C. Cir., July 12, 1994). In light of the court's decision, the Field Operations Bureau, on its own motion, sets aside (eliminates) the June 15, 1994, Order issued to William K. Schweitzer dba Yellow Cab Company of Palo Alto. Although we are setting aside the Order issued by the Bureau, the Petition for Reconsideration will remain pending. Thus, this action does not preclude the Bureau's further consideration of the appropriate forfeiture amount under applicable Commission precedent involving similar violations. The underlying Orders and the Petition for Reconsideration previously submitted will therefore be reviewed and addressed in a subsequent Order.

3. Accordingly, IT IS ORDERED, that the June 15, 1994, Order by the Bureau assessing a monetary forfeiture in the amount of four thousand ($4,000) against William K. Schweitzer dba Yellow Cab Company of Palo Alto for violation of Section 90.113 of the Rules, is SET ASIDE, and the Petition for Reconsideration IS RETURNED TO PENDING STATUS.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Jacor Broadcasting of Colorado, Inc.
Licensee, Station KOA-AM
Denver, Colorado

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1994; Released: August 31, 1994

By the Chief, Mass Media Bureau:

1. On July 12, 1994, the Commission, by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, issued a Memorandum Opinion and Order, DA 94-754, assessing a forfeiture of $2,500 against Jacor Broadcasting of Colorado, Inc., licensee of Station KOA-AM, Denver, Colorado, for violation of Section 73.1216 of the Commission's Rules. The forfeiture order in part rejected the arguments raised in the licensee's July 30, 1993, response (titled "petition for reconsideration") to the June 30, 1993, Notice of Apparent Liability issued in this matter.[1]

2. On July 12, 1994 (the same day the instant forfeiture order was released), the United States Court of Appeals for the District of Columbia Circuit, in *United States Telephone Assn. v. FCC*, Case No. 92-1321 (*"USTA v. FCC"*), set aside the forfeiture standards established in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339, *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). In calculating the forfeiture amount to be assessed against Jacor Broadcasting of Colorado, Inc., our Memorandum Opinion and Order relied upon the standards of the *Policy Statement*. In light of the *USTA v. FCC* decision, we accordingly set aside this sanction on our own motion and return the petition for reconsideration to pending status. We act in this regard under the provisions of Section 1.113 of the Commission's Rules, which permits us to modify or set aside sanctions that we have imposed within 60 days after notice of the sanction has been served on the party affected. This action is without prejudice to further action on the petition for reconsideration and further consideration of the appropriate forfeiture amount under applicable statutory and regulatory provisions and precedent.

3. Accordingly, IT IS ORDERED, that our July 12, 1993, decision denying the petition for reconsideration filed by Jacor Broadcasting of Colorado, Inc., licensee of Station KOA-AM, Denver, Colorado, and assessing a forfeiture against said licensee for violation of Section 73.1216 of the Commission's Rules, is SET ASIDE, and the petition for reconsideration IS RETURNED to pending status.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] 8 FCC Rcd 4352 (MMB 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-270

In the Matter of

Washington Public Safety Plan

ORDER

Adopted: August 23, 1994; Released: August 31, 1994

By the Acting Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Washington (Region 43) Public Safety Plan (Plan) on November 15, 1991, 6 FCC Rcd 7017 (1991).

2. By letter dated April 4, 1994, the Region proposed to amend its Plan. The proposed amendment would reformat the Plan, add two yearly filing windows and further clarify the application review procedures. The Commission placed the letter on Public Notice for comments due on July 28, 1994, 59 FR 32961 (June 27, 1994), and received no comments.

3. We have reviewed the proposed amendment to the Region 43 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Washington (Region 43) IS AMENDED, as set forth in the Region's letter of April 4, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Rosalind K. Allen
Acting Chief, Land Mobile and
Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum
Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of River City License Partnership against ACI Management, Inc.	CSR-4151-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1994; Released: September 1, 1994

By the Chief, Cable Services Bureau:

1. On November 5, 1993, River City License Partnership, licensee of station KABB-TV, San Antonio, Texas ("KABB-TV"), filed a must-carry complaint with the Commission against ACI Management, Inc. ("ACI") pursuant to 47 C.F.R. §§ 76.7 and 76.61(a). In its complaint, KABB-TV states that ACI operates cable television systems serving Moulton, located in Lavaca County, and Waelder, located in Gonzales County, Texas, and that both counties are part of the San Antonio Area of Dominant Influence ("ADI"). KABB-TV states that it is entitled to must-carry status on these cable systems, pursuant to § 614 of the Communications Act of 1934, as amended ("Communications Act"), and 47 C.F.R. § 76.56. KABB-TV's over-the-air channel designation is 29. However, KABB-TV requests that the Commission order ACI to carry its signal on channel 11 on both systems. No opposition to this complaint has been filed.

2. Section 614(b)(6) of the Communications Act provides that the signals of local commercial television stations carried pursuant to must-carry rules must be carried on either 1) the same channel on which the station is broadcast over the air, 2) the cable channel on which it was carried on July 19, 1985, or 3) the cable channel on which it was carried on January 1, 1992.[1] The election of which of these three alternatives to choose is left up to the station involved.[2] Another channel that is mutually agreed upon by the station and cable operator also may be selected.[3]

3. The Communications Act mandates that each signal carried in fulfillment of the must-carry rules shall be carried according to the three alternatives already discussed. The Commission has no discretion to modify that requirement. KABB-TV's complaint fails to establish that its request for carriage on cable channel 11 is based upon any one of the three factors described in the Communications Act and our rules. It provides no evidence to show that it has a right to be carried on channel 11, beyond the fact that it is assigned to a television market served by ACI. Therefore, although KABB-TV has established its right to carriage on ACI's cable television systems serving Moulton and Waelder, Texas, it has not established its right to carriage on channel 11 on either of those systems.

4. Accordingly, IT IS ORDERED, that the complaint filed November 5, 1993 by KABB-TV, IS GRANTED IN PART AND DENIED IN PART in accordance with § 614(d)(3)(47 U.S.C. §534) of the Communications Act as indicated above and ACI IS ORDERED to commence carriage of KABB-TV within forty-five (45) days from the release date of this Order on its cable television systems serving Moulton and Waelder, Texas.

5. This action is taken by the Chief, Cable Services Bureau, pursuant to 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See also* 47 C.F.R. § 76.57(a).
[2] *Communications Act*, § 614(b)(6); 47 C.F.R. § 76.57(a).
[3] *Communications Act*, § 614(b)(6); 47 C.F.R. §76.57(c).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In Re Applications of

THOMAS W. LAWHORNE — File No. BPH-880505OA

CAM BROADCASTING, INC. — File No. BPH-880505OJ

For Construction Permit for a
New FM Station Channel 271A
at Sylvester, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1994; Released: September 1, 1994

By the Commission:

1. This proceeding involves the applications of Thomas W. Lawhorne and CAM Broadcasting, Inc. for authority to construct a new FM broadcast station at Sylvester, Georgia. The history of this proceeding is set out at 7 FCC Rcd 13 (Rev. Bd. 1992), granting Lawhorne's application and denying that of CAM. After CAM's Application for Review of that ruling was denied, 7 FCC Rcd 4341 (1992), CAM filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit (No. 92-1350). On December 28, 1993, the court returned this matter to the Commission for further proceedings. By this order, we remand for further hearings on basic qualifying issues previously specified against CAM.

2. As Lawhorne asserts,[1] no hearing has ever been held on abuse of process, financial qualifications and misrepresentation issues specified against CAM, such matters could ultimately result in the denial of CAM's application and the concomitant grant of Lawhorne's proposal, and the general freeze on comparative broadcast hearings, 9 FCC Rcd 1055 (1994), permits the taking of evidence on already specified basic qualifying issues. Under these circumstances, Lawhorne has clearly established that his request for relief should be granted.

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Remand to Administrative Law Judge filed May 2, 1994 by Thomas W. Lawhorne IS GRANTED and that this proceeding IS REMANDED to the Chief Administrative Law Judge for assignment to a presiding Administrative Law Judge and for hearings on issues 2, 3, and 4, as set forth at 7 FCC Rcd 13 ¶ 2 (Rev. Bd. 1992).

[1] Lawhorne filed a Motion for Remand to Administrative Law Judge on May 2, 1994. No response has been received from CAM.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-228

In the Matter of

Illinois Public Safety Plan

ORDER

Adopted: August 25, 1994; Released: September 1, 1994

By the Acting Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Illinois (Region 13) Public Safety Plan (Plan) on September 30, 1991, 56 FR 54576 (October 22, 1991).

2. By letter dated May 10, 1994, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments. The Commission placed the letter on Public Notice for comments due on August 4, 1994, 59 FR 34623 (July 6, 1994), and received no comments.

3. We have reviewed the proposed amendment to the Region 13 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Illinois (Region 13) IS AMENDED, as set forth in the Region's letter of May 10, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Rosalind K. Allen
Acting Chief, Land Mobile
and Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BPET-811118KF

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

Order to Show Cause Why the Permit for KEEF-TV Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870225KE

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BMPCT-870610KU

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870610KT

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of Noncommercial Educational Station KEEF-TV, Los Angeles, CA.

For Special Temporary Authority

ORDER

Adopted: August 23, 1994; Released: September 1, 1994

By the Commission:

1. This order denies an Application for Review, filed March 7, 1994, by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum (the Wade Group), which seeks review of an order by the General Counsel dismissing as repetitious a petition for reconsideration filed by the Wade Group. *Black Television "Workshop of Los Angeles, Inc.*, FCC 94I-013 (Feb. 15, 1994).[1] The Wade Group sought reconsideration of a Commission memorandum opinion and order which denied reconsideration of a decision which revoked the construction permit of Black Television Workshop of Los Angeles, Inc. (BTW) for station KEEF-TV, Los Angeles, California. *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192 (1993), *recon. denied*, 8 FCC Rcd 8719 (1993).

2. IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review, filed March 7, 1994, by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.[2]

[1] Also before the Commission are oppositions, filed March 14, 1994, by the Mass Media Bureau, and March 15, 1994 by Mary V. Woodfork.

[2] In view of the Wade Group's continued assertion of previously raised contentions, we note that there must be some finality to the administrative process, or else we would be involved in a never-ending process of review that would frustrate our ability to conduct our business in an orderly fashion. *See Warren Price Communications, Inc.*, 7 FCC Rcd 6850, n.1 (1992).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 19, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC PETITION FOR EXPEDITED WAIVER OF COMMISSION RULES FOR 500 ACCESS SERVICE

On August 15, 1994, Pacific Bell (Pacific) petitioned the Commission for an expedited waiver of Part 69 of the Commission's Rules to establish three new rate elements to recover the costs association with the provision of 500 Access Service.

Pacific states that the new 500 Access Service will allow customers to provide their end users with services that use the 500 Service Access Code (SAC). Pacific adds that 500 Access Service will use the same "NXX Plan" currently used for 900 Access Service, with Pacific using six-digit screening to route calls. Pacific specificallly requests authority to implement three new non-recurring rate elements. Existing switched access usage rates would also apply to 500 Access Service.

Interested parties may file comments on this petition for waiver by **September 2, 1994**, and reply comments by **September 14, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition for waiver can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6788
Tariff F.C.C. Nos. 9 and 11

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1994; Released: August 12, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 17, 1994, AT&T Communications (AT&T) filed Transmittal No. 6788, by which AT&T proposes to amend its private line Tariff F.C.C. Nos. 9 and 11 to introduce "Feature Group A (FGA) and Feature Group B (FGB) Connections which provide the physical connection between a Local Exchange Company End Office Switch and the AT&T Central Office, for connection to AT&T Private Line Services." AT&T proposes to apply a single FGA (or FGB) charge to each FGA (or FGB) service it connects.[1] No petitions were filed against the transmittal, which is scheduled to take effect on August 13, 1994.[2] For the reasons stated below, we are suspending Transmittal 6788 pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), for the full five month period; initiating an investigation with issues to be designated in a subsequent order; and imposing an accounting order.

II. BACKGROUND

2. *LEC Switched Access Feature Group A and B Services.* Following divestiture, the local exchange carriers' (LECs') switched access tariffs offered four types or "feature groups" of switched access service: A, B, C and D. Feature Groups A and B are local exchange services that are used to provide interstate access, with service characteristics on the originating end that differ from Feature Group D, the equal access connection now used by most interexchange carriers (IXCs) in equal access areas. Feature Groups A and B were very important services in the initial period after access charges were created, before the significant expansion of equal access offices. Feature Group A access[3] provides a customer with dedicated transmission facilities from an IXC's Point of Presence (POP) to an end office, called the dial tone office, and a seven-digit number through which end users located within the carrier's service area[4] wishing to call the customer can place such calls.

3. Two groups have been the primary subscribers to Feature Group A access. Smaller IXCs have relied upon it to provide interstate switched toll service at end offices where neither Feature Group D equal access nor Feature Group B is available. Within LATAs in which such an IXC takes Feature Group A, a customer of that IXC dials the Feature Group A seven digit number to reach the IXC's POP and then dials an authorization code and the ten digit number the customer wishes to call. The caller must pay any toll or message unit charges incurred to reach the IXC's POP in addition to the IXC's toll charges. When the LEC terminates the call through a Feature Group A access arrangement, however, it will carry the call anywhere within the receiving service area without assessing any additional toll charges or local message unit charges, even if the called party is located outside of the local service area of the IXC's Feature Group A dial tone office.

4. Feature Group A is also used by end users as part of a Foreign Exchange (FX) or Off Network Access Line (ONAL) arrangement. In this configuration, the customer obtains, with a seven digit number, a combination of local exchange service and dedicated interoffice transport facilities linking the LEC dial tone office with an IXC POP. FX service calls originating or terminating in a distant local exchange outside the local calling area of the Feature Group A FX customer are treated by the distant LEC like local calls made within the distant exchange for purposes of reaching the Feature Group A FX customer.

5. Feature Group A service allows callers to contact a Feature Group A customer outside their local calling area without paying toll charges to either the IXC or to the LEC. For example, a Feature Group A customer in Newark, New Jersey (the closed end) may list its seven digit number in New York City in the local New York City directory as if it were a local number. A caller located in New York City (the open end) could dial that seven digit number without incurring a toll charge. Some IXCs may also use Feature Group A as an equal access connection to originate and terminate calls by their end user customers. In such circumstances, the end user must dial a seven digit number to reach the LEC's dial tone office serving the IXC, where the LEC switches the call to the IXC's POP via

---

[1] AT&T proposes to charge from approximately $275 to $589 for installation, and approximately $52 to $278 each month for its Feature Group A and B service.

[2] On July 7, 1994, AT&T filed Application No. 2006 for special permission to clarify minor aspects of the tariff. Although the Bureau granted the application, AT&T did not file a subsequent revision to implement the changes it proposed.

[3] For ease of discussion, we will refer primarily to Feature Group A service in this portion of the text, although the same principles apply to Feature Group B service. Feature Group B differs from Feature Group A in the following ways: Feature Group B is a trunk-side connection; calls are processed through the end office switch or access tandem. The originating caller must use a seven-digit access number, but the number is the same nationwide. Carrier access codes are in universal format: 950-XXXX. In the terminating direction, calls terminate at subtending end offices where access tandems are employed and at end offices where connection to an end office is directly made. Because Feature Group B is a trunk-side connection, Feature Group B offers greater functionality and is more useful for IXC services. Feature Group B is also currently used to connect callers to enhanced service provider offerings in lieu of 800 number access because the Feature Group B number is the same nationwide.

[4] In the case of the former Bell Operating Companies, these serving areas are called Local Access and Transport Areas, or LATAs.

a dedicated, loop-side connection. In many cases, the dial tone is not provided in the same end office that services the IXC POP. In these cases, there will be a separate serving wire center between the dial tone office and the IXC POP.[5]

6. Prior to the local transport rate restructure that occurred in 1993, terminating Feature Group A transport charges were usually based on the Feature Group A customer's usage and the distance between the serving wire center of the IXC and the end office serving the called party. Originating Feature Group A transport charges, however, were based on the Feature Group A customer's usage and on the distance between the serving wire center to which the IXC's POP was linked and the Feature Group A customer's dial tone office, not the end office serving the calling party. This difference arose because most LEC switches were unable to differentiate between an originating Feature Group A call and a local call. Hence, originating Feature Group A access charges were assessed as though the call originated from an end user served by the dial tone office. End users were billed for their use of Feature Group A transport service under the equal charge per minute of use rule, originally mandated by the Modification of Final Judgment for the Bell Operating Companies.[6] To obtain this service, the end user frequently authorized AT&T to act as agent in ordering the access portion of the feature group service from the local exchange carrier, and the LEC billed the end user for usage charges associated with the service. The type of connection between the IXC POP and the serving wire center, whether voice grade, DS-1 or DS-3, had no bearing on the Feature Group A charges under the equal charge rule. In other words, the network facilities used to provide transport service were generally transparent to the Feature Group A customer.

7. *The Local Transport Rate Restructure.* In the local transport restructure proceeding, the Commission replaced the equal charge rule with a new system of interim rate elements designed to make a better match between LEC transport rates and their actual costs.[7] The interim local transport rate structure established in the *Transport Order* consists of four unbundled rate elements: entrance facilities, direct trunked transport, tandem switched transport and the interconnection charge. Flat-rated charges apply to entrance facilities and direct trunked transport, while usage-sensitive charges apply to tandem switched transport. The interconnection charge is usage sensitive and is to be paid by all interstate access customers that interconnect with the LEC switched access network.[8] In the *First Reconsideration Order*, the Commission specifically addressed the application of the transport rate restructure to Feature Group A services.[9] The Commission directed the LECs to apply the flat-rated entrance facility element to transport between the IXC POP and the LEC serving wire center for both originating and terminating Feature Group A traffic. If the LEC serving wire center was an office different from the dial tone office, the flat-rated direct trunked transport charge was to apply to transport between the serving wire center and the dial tone office. Tandem switched transport rates, excluding the tandem charge, should apply to transport between the dial tone office and the end office. The Commission did not tell the LEC to bill differently for the services using the facilities described in the transport rate elements than it did before the transport restructure.[10]

8. *The Impact on LEC Feature Group A Billing.* A voice grade circuit is generally the only entrance facility that is required to carry traffic from a Feature Group A end user between a serving wire center and an IXC POP. The entrance facilities that AT&T orders to link its POPs to serving wire centers or dial tone offices, however, are always high capacity facilities. The lowest capacity facilities used by AT&T are DS-1 circuits, which usually are equivalent in capacity to 24 voice-grade channels. Before the transport restructure, the costs of the facilities used to provide Feature Group A service were recovered through the uniform per minute rates each LEC assessed upon all access service users, regardless of whether the LEC used voice grade or high capacity facilities to carry the traffic to the IXC POP.

9. With the transport restructure, however, charges are assessed by type of facility ordered by the customer. Some LECs now assert that they must identify a single customer using specific dedicated facilities to assess the correct flat-rated charge. Some LECs are, under these circumstances, reluctant to bill end users for a stand alone voice grade dedicated transport and entrance facility service, when the IXC interface is a DS-1 or higher. They fear that a LEC offering stand alone voice grade facilities would have to absorb the costs of any channels on the high capacity facilities that are not sold to end users or other customers. If a LEC bills the IXC for the full cost of the entrance facility, however, the IXC, not the LEC, absorbs the cost of the channels that are not in use. Under the *Transport Orders*, moreover, LECs were not required to bill individual Feature Group A or B customers directly for only their pro rata share of the charges for the high capacity entrance facilities linking AT&T's POP and the LEC's serving wire center.[11] If the LECs were to "split" the charge for the entrance facility in this manner, they could recover the aggregate charge directly from end user Feature Group A customers based on their relative share of the facility's capacity that is actually in use.

10. AT&T raised the billing problem associated with Feature Group A flat-rated facilities in the transport restructure tariff review process.[12] AT&T argued that the proposed change in LEC billing practice was not required by the *Transport Orders*. In the *Transport Tariff Order*, the Common Carrier Bureau agreed that split billing by the

---

[5] For purposes of our discussion in this Order, a serving wire center is the central office designated by the LEC to serve the geographic area in which the IXC POP is located.

[6] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983). The "equal charge per minute of use" rule requires that charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area to be equal, per unit of traffic delivered or received, for all interexchange carriers[.] *See* App. B at para. B(3).

[7] Transport Rates Structure and Pricing, 7 FCC Rcd 7006 (1992)(*Transport Order); recon.*, 8 FCC Rcd 5370 (1993)(*First Reconsideration Order); further recon.*, 8 FCC Rcd 6233 (1993); *further recon. pending*, (collectively, *Transport Orders*).

[8] *Transport Order*, 7 FCC Rcd at 7009-10.

[9] *First Reconsideration Order*, 8 FCC Rcd at 5372-73.

[10] *Id.*

[11] *See Transport Orders.*

[12] In the Matter of Petitions for Waiver of Transport Rate Structure and Pricing Requirements, 9 FCC Rcd 796 (Com. Car.

LECs is crucial for customers to obtain maximum benefits from the restructured rates.[13] The Bureau directed the LECs to refer the split billing issue, particularly as it affected Feature Group A service, to the industry's Ordering and Billing Forum for resolution and to report back to the Bureau on their progress in resolving the "split billing issue." The Bureau stated at that time that if substantial progress was not forthcoming, the Commission might consider prescribing a method for providing split billing.[14]

11. Since the transport restructure tariffs took effect last December, the LECs have continued billing the end user customer for the usage-rated transport elements of Feature Group A and B.[15] Many LECs, however, have not offered to split the charges for the use of the flat-rated entrance facilities among these customers. Rather, they are now billing AT&T for the entire entrance facility and direct-trunked transport rate elements for Feature Group A and B service under their transport restructure tariffs. The LECs have explained that AT&T is the ordering customer for the entrance facilities -- and, where appropriate, for the direct trunked transport element -- because AT&T has specified that Feature Group lines are to be connected to its point of presence at the DS-1 level.[16] Moreover, the LECs claim that, because the DS-1 facilities are dedicated to AT&T's use, AT&T as the cost causer is responsible for payment.

12. At least two LECs, Southwestern and NYNEX, have developed and now offer interim billing options for transport.[17] Southwestern's tariffed "Interim Split Billing Option," for example, credits the bills of "primary customers" to whom it charges an entire entrance facility based on the number of "secondary customers" sharing the facility. For every "secondary customer" the primary customer identifies, the LEC gives the primary customer a credit equal to one twenty-fourth of the monthly DS-1 charges normally billed. Thus, if AT&T were to tell Southwestern that twenty-one parties were sharing the use of an AT&T DS-1 entrance facility, Southwestern would credit AT&T's bill for twenty-one twenty-fourths of AT&T's normal monthly DS-1 charge. AT&T would pay Southwestern only the remainder, or three twenty-fourths, of the entire billed amount. NYNEX's tariffed "Shared Billing Arrangement" allows end user customers to order lower capacity facilities from NYNEX for connection to the IXC's higher capacity facilities. NYNEX maintains separate facility and billing records for each customer. Unlike Southwestern and NYNEX, however, most LECs have no plans to provide a billing option that would apportion the charges for an entire facility among several customers, and are opposed to this approach.

13. *Transmittal 6788.* In response to this change in LEC billing practices, AT&T determined that if the LECs were billing AT&T for the local transport rate elements in Feature Groups A and B, AT&T would in turn bill the existing Feature Group A and B customers for these charges. During the transport tariff review proceeding,[18] AT&T objected to, and has apparently declined to use, the existing LEC billing options that address the issue of apportioning charges for the facilities used to provide Feature Group service among multiple Feature Group end user customers. AT&T claims the LECs would still hold it responsible as the "primary customer" for any unused capacity or unpaid charges of the secondary customers.[19] Rather, by Transmittal 6788, AT&T proposes to offer, on a resale basis, the two flat-rated local transport portions of Feature Group A and B service in conjunction with the interexchange private line portion of these services that AT&T was already providing. Transmittal 6788 defines a "Feature Group A Connection" as a transmission path between the line side of a LEC end office switch and the AT&T POP for connection to AT&T Private Line services. Transmittal 6788 further states that a Feature Group A Connection provides line side access to a LEC end office switch, with an associated seven digit local telephone number, for an AT&T end user customer's use in originating and terminating calls. Similarly, Transmittal 6788 defines a "Feature Group B Connection" as the transmission path between the trunk side of a LEC end office switch and the AT&T POP for connection to AT&T private line services. It further provides that the Feature Group B connection offers trunk side access to a LEC end office switch, with an associated uniform 950-XXXX access code, for AT&T end user customers' use in originating and terminating calls. Finally, Transmittal 6788 requires both Feature Group A and B customers to purchase an "access coordination function," which authorizes AT&T to design, order, install, and perform other provisioning activities for the end user.[20]

Bur. 1993); *see also* In the Matter of Local Exchange Carrier Switched Local Transport Restructure Tariffs, 9 FCC Rcd 400 (Com. Car. Bur. 1993)(*Transport Tariff Order*).

[13] Under "split billing" LECs might, for example, bill an end user customer for its use of a high capacity facility by dividing total flat charges for the entrance facility among all of the end users whose traffic is carried over the facility.

[14] *Transport Tariff Order*, 9 FCC Rcd at 427.

[15] *See, e.g.*, Letter from Joseph J. Mulieri, Director, FCC Relations, Bell Atlantic Network Services, Inc., to Gregory J. Vogt, Chief, Tariff Division, FCC (dated May 4, 1994); Letter from Cyndie Eby, Executive Director, Federal Regulatory, US West, Inc., to Gregory J. Vogt, Chief, Tariff Division, FCC (dated May 4, 1994).

[16] The LECs generally justify this billing practice as a result of the transport rate restructure. For example, Pacific has observed that paragraph 22 of the *Transport Order* states that "a flat-rate charge (entrance facilities) is appropriate because the entrance facilities are dedicated to the sole use of one IXC and, therefore, that IXC should bear the full cost of the facilities." It argues further that paragraph 22 of the *Transport Order* applies the same reasoning to billing direct trunked transport. *See* Letter from Jo Ann Goddard, Pacific Bell, to Gregory Vogt, Chief, Tariff Division, FCC (dated May 4, 1994). NYNEX argues that the restructure in general changed the billing structure from an equal charge per MOU to a facility-based rate structure. NYNEX adds that "during the conversion of the MOU billing structure to the new facility-based billing structure, the interface level was the key record for determining the party to be billed for the entrance facilities." *See* Letter from Kenneth Rust, NYNEX, to William F. Caton, Acting Secretary, FCC (dated May 4, 1994). It thus appears that by NYNEX decided to bill AT&T for the entrance facilities because AT&T requires that connections be made to its POP at a DS-1 interface level.

[17] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 6.8.15; NYNEX Telephone Company Tariff F.C.C. No. 1, § 6.7.14.

[18] *Transport Tariff Order*, 9 FCC Rcd at 423-424.

[19] *Transport Tariff Order*, 9 FCC Rcd at 423-424.

[20] *See* AT&T Tariff F.C.C. No. 11, Sections 8.2.8 and 8.2.9.

III. DISCUSSION

14. Under Transmittal 6788, AT&T proposes to resell to Feature Group A customers, on a bundled basis, the entrance facility and direct trunked transport rate elements so that it can recoup the local transport charges assessed to it by the LECs.[21] Yet, Transmittal 6788 does not state how the end user customer of LEC Feature Group A or B access service becomes an AT&T customer for these "resold" access rate elements. Nor does Transmittal 6788 specify how a customer can either affirmatively order, or decline to receive, this service from AT&T if the customer desires to continue receiving one or both of these service elements from the LECs. It appears that for Feature Group A and B customers who are unable to receive a bill from their local exchange carrier for their pro rata share of the entrance facility and direct-trunked transport rate elements used to provide Feature Group A and B service, AT&T will in effect become the sole provider of a voice grade "access" connection to its own portion of Feature Group A and B service. Moreover, in discussions with Tariff Division staff, AT&T stated that it had informed Feature Group A and B customers of a likely rate increase for AT&T's new "connection service," but did not include any further information about how to subscribe, or decline to subscribe, to the service.

15. AT&T's current tariff language defines a customer as "the person or legal entity which orders a local channel service (either directly or through an agent)."[22] Giving the term "order" its common meaning of a request that something be supplied,[23] the "customer" must perform some affirmative act to establish that it wishes to receive Feature Group A or B Connection service from AT&T to indicate its intent to make AT&T the supplier of the flat-rated transport portion of Feature Group A or B service. It is not clear from the face of the tariff if or how this ordering process takes place. It therefore appears that AT&T proposes to charge an end user for access service even though it is unclear whether the end user has affirmatively ordered the service from it. The practices described in the proposed tariff revisions therefore raise a question as to whether Transmittal 6788 is lawful under Section 201(b) of the Communications Act[24]

16. Because Transmittal 6788 also does not describe how LEC access customers can become AT&T's customers for an access service that is provided not by AT&T, but rather, by another carrier, Transmittal 6788 may be vague and ambiguous in violation of Part 61 of the Commission's Rules, 47 C.F.R. Part 61.[25]

17. Based on our analysis of Transmittal 6788, we find that AT&T's tariff transmittal raises significant questions of lawfulness that warrant suspension for five months, investigation, and imposition of an accounting order. We will designate specific issues and establish a pleading cycle for this investigation in a subsequent order.

IV. ORDERING CLAUSES

18 . Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed under AT&T Communications Transmittal No. 6788 in Tariff F.C.C. Nos. 9 and 11, ARE SUSPENDED for five months from the currently scheduled effective date.

19. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. § § 154(i), 204(a), 205(a) and 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed under Transmittal 6788.

20. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications act, 47 U.S.C., § § 154(i) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that AT&T Communications SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the transmittal that is the subject of this investigation, and of all amounts paid thereunder and by whom such amounts are paid.

21. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE tariff revisions reflecting this suspension no later than three business days from the release date of this Order. It should cite the "DA" of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

---

[21] Under the local transport restructure, the LECs are required to provide these rate elements on an unbundled basis, so that customers may choose alternative suppliers for portions of access service as their needs dictate. *See Transport Order*, 7 FCC Rcd at 7016-17. In discussions with Tariff Division staff, AT&T refused to provide these elements on an unbundled basis.

[22] AT&T Tariff F.C.C. No. 11, § 2.10.

[23] *United Artists Payphone Corp. v. New York Telephone Company, and American Telephone and Telegraph Company*, 8 FCC Rcd 5563, 5565 (1993) (*citing* Webster's II New Riverside Univ. Dictionary 827 (1984)).

[24] Section 201 of the Communications Act, 47 C.F.R. § 201(b). Section 201(b) of the Act requires all practices in connection with interstate communications by wire to be just and reasonable. *See also* Capital Network Systems, Inc., 6 FCC Rcd 5609 (Com. Car. Bur. 1991), *app. for review den.*, 7 FCC Rcd 8092 (1992), *petition for review den.*, Capital Network Systems, Inc. v. FCC, No. 92-1640 (July 15, 1994).

[25] Section 61.1 of the Commission's Rules, 47 C.F.R. § 61.1, states that failure to comply with any provisions of Part 61 may be grounds for rejecting the non-complying publications. Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2, requires tariff publications to contain clear and explicit explanatory statements regarding the rates and regulations. 47 C.F.R. § 61.54(j) of the Rules, 47 C.F.R. 61.54(j), also requires that general rules, including definitions, regulations, exceptions and conditions governing the tariff must be stated clearly and definitely.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 7176
Tariff F.C.C. No. 2

ORDER

Adopted: August 18, 1994; Released: August 19, 1994

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On June 27, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing amends the discontinuance without liability section of Tariff 2. The transmittal is currently scheduled to take effect on August 17, 1994.[1]

2. On July 1, 1994, The Furst Group, Inc. and Winback and Conserve Program, Inc. filed petitions to reject, or to suspend and investigate, Transmittal No. 7176. AT&T filed a reply on July 8.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 7176 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 7176, filed by the Furst Group, Inc. and by Winback and Conserve Program, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

[1] On August 17, 1994, AT&T filed Transmittal No. 7371 to amend the discontinuance without liability provisions in Uniplan and Customnet Combined service offerings, and to advance the effective date of the tariff revisions in Tr. 7176 to August 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver to Use
Frequencies in the 500-506
MHz Band in New York City

ORDER GRANTING REQUEST TO DEFER COMMENT DATES

Adopted: August 22, 1994; Released: August 22, 1994

Comment Date: September 21, 1994
Reply Comment Date: October 6, 1994

By the Office of Engineering and Technology:

1. On August 17, 1994, the TV Broadcasters All Industry Committee (TVAIC) petitioned the Commission to extend the pleading cycle for comments in the above-captioned proceeding by sixty days. Currently, comments are due August 22, 1994, and reply comments are due September 6, 1994.

2. TVAIC, a group of television broadcasters that operate from the World Trade Center in New York City, argues that the details underlying the Request for Waiver are several hundred pages and that it needs to review these details in order to assess the impact on current and future broadcasting activities. TVAIC also argues that another pending waiver to use frequencies at 482-488 MHz must also be evaluated to determine the impact of the two requests individually and in conjunction. Finally, TVAIC states that it intends to meet with representatives of the waiver requests to ensure that expertise from each perspective is applied to best serve the public interest. Therefore, TVAIC maintains that additional time is required to accomplish these goals and to provide meaningful comments to the Commission.

3. Although TVAIC did not timely file its extension request,[1] and the Commission does not routinely grant extensions,[2] we agree with TVAIC that the public interest would be more adequately served if additional time is permitted for submitting comments on the Request for Waiver. An extension of time would allow the parties to meet and discuss the technical issues involved and perhaps reach a consensus on the best approach for meeting the important needs of both the public safety and broadcasting communities. However, we wish to resolve the Request for Waiver in an expeditious manner, and we believe that a 30 day extension is sufficient. Accordingly, IT IS ORDERED, that the date for filing comments IS EXTENDED to September 21, 1994, and the date for filing reply comments IS EXTENDED to October 6, 1994.[3]

4. This action is taken pursuant to authority found in Sections 4 (i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303; and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.31, 0.241, and 1.46. For further information contact Ray LaForge, Office of Engineering and Technology, (202)653-8117.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Deputy Chief Engineer

[1] To be timely filed, an extension request must be submitted at least seven days in advance of the comment deadline; *see* 47 C.F.R. § 1.46(b)(1993).

[2] 47 C.F.R. § 1.46(a)(1993).

[3] Inasmuch as this *Order* is being released after release of the August 22, 1994 *Daily Digest*, we will permit parties who have filed comments on or before the original August 22 deadline date to file supplemental comments on or before September 21.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 7096
Tariff F.C.C. No. 2

ORDER

Adopted: August 22, 1994; Released: August 22, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 14, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing modifies the regulations in Tariff 2 to include a deposit requirement for customers ordering new 800 Customer Specific Term Plan IIs (CSTP IIs) or upgrading their current CSTP II plans. The transmittal is currently scheduled to take effect on August 23, 1994.[1]

2. On June 20, 1994, Advanced Telecommunication Network, Inc., the Furst Group, Inc. and GE Capital Communication Services Corporation filed petitions to reject, or to suspend and investigate, Transmittal No. 7096. AT&T filed a reply on June 23.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 7096 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 7096, filed by Advanced Telecommunication Network, Inc., the Furst Group, Inc. and GE Capital Communication Services Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On August 19, 1994, AT&T filed Transmittal No. 7396 to clarify the deposit provisions and advance the effective date of the tariff revisions in Tr. 7096 to August 23.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the
Commission's Rules Relating to
License Renewals in the
Domestic Public Cellular Radio
Telecommunications Service

MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION

Adopted: June 13, 1994; Released: July 7, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. In our *Memorandum Opinion and Order on Reconsideration (Reconsideration Order)* in this docketed proceeding, 8 FCC Rcd 2834 (1993), we made certain modifications to the *Report and Order* in this proceeding, 7 FCC Rcd 719 (1992). Specifically, we revised the standards for awarding a renewal expectancy, which is a major comparative preference awarded to a licensee for its performance during its license term when a mutually exclusive application is filed against its renewal application. We replaced the first of the original three renewal expectancy criteria with a standard requiring a renewal applicant to demonstrate that its performance has been "substantial," which we defined as sound, favorable and substantially above a level of mediocre service just minimally warranting renewal. We also adopted a two-step hearing procedure which allows the Commission to grant a renewal application without conducting a full comparative hearing if a threshold hearing determines that the renewal applicant has performed substantially and thus deserves a renewal expectancy.[1] Under this procedure, if a licensee receives a renewal expectancy in the threshold hearing, competing applicants will not be considered eligible for grant of the license in question.[2] Further, we revised our renewal criteria by eliminating misconduct by a licensee that does not involve violations of the Communications Act of 1934, as amended (the Act), or the Commission's rules or policies as a factor in our decision of whether to award a renewal expectancy. We also revised and clarified other substantive and procedural rules for comparative cellular renewal hearings.

2. BellSouth Corporation, BellSouth Enterprises, Inc. and BellSouth Cellular Corp. (collectively referred to as BellSouth) and GTE Corporation (GTE) on behalf of GTE Mobilnet Incorporated and Contel Cellular Incorporated filed a "Joint Petition for Clarification and Further Reconsideration" (Joint Petition) of our *Reconsideration Order*, while U S WEST NewVector Group, Inc. (NewVector) filed a "Petition for Limited Clarification" of that order.[3] Responsive pleadings were filed by the Cellular Telecommunications Industry Association (CTIA), McCaw Cellular Communications, Inc. (McCaw), and Southwestern Bell Mobile Systems, Inc. (Southwestern Bell). In addition, further comments on the character disclosure requirements of footnote six of the *Reconsideration Order* were filed by CTIA, BellSouth, GTE, and Southwestern Bell.

3. In this Memorandum Opinion and Order on Further Reconsideration, we grant NewVector's "Petition for Limited Clarification." Further, we grant the Joint Petition filed by BellSouth and GTE to the extent indicated herein and otherwise deny that petition. In brief, this Memorandum Opinion and Order on Further Reconsideration clarifies and revises our Rules concerning the procedures to be used in comparative cellular renewal hearings.

II. DISCUSSION

A. Licenses for Unserved Areas

4. NewVector asks that we clarify that footnote 8 of our *Reconsideration Order* was not meant to imply that unserved area applications or authorizations will play any role in the cellular renewal process. The Joint Petition filed by BellSouth and GTE and the responsive pleadings filed by McCaw and Southwestern Bell support this request. Footnote 8 of our *Reconsideration Order* explains that initial licensees of all of our cellular markets (both Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs)) received the exclusive right to "fill-in" unserved areas of their respective markets for a period of five years, citing Sections 22.31(a)(1) and 22.31(f) of our Rules. The referenced footnote also explains that after the five-year fill-in period expires, any licensee or potential applicant who wishes to serve an area within a market which is not already being served must file an application which is subject to mutually exclusive applications.[4] NewVector notes that any grants for such unserved areas would be beyond the scope of the Commission's consideration in comparative renewal proceedings because those unserved area grants would be separate and distinct licenses

[1] The two-step procedure is delineated in Section 22.942 of our Rules, which was adopted in our *Reconsideration Order*. That order also stayed the effectiveness of Section 22.942 until the *Reconsideration Order* is final and no longer subject to judicial review. By this Order we vacate that stay. See para. 25, *infra*.

[2] The two-step procedure allows a competing applicant which proposes to provide service which far exceeds that presently being provided by the incumbent licensee to request a waiver of step one of the two-step procedure. *See Report and Order*, paragraph 25, n.20.

[3] Telecommunications Research and Action Center and the Washington Citizens Coalition Interested in Viewers Constitutional Rights (collectively "TRAC") also filed a petition for reconsideration of our *Reconsideration Order*, in which it argued that our two-step hearing procedure for comparative cellular renewal proceedings is illegal. We have already denied that petition in a separate order. *See Memorandum Opinion and Order*, 8 FCC Rcd 6288 (1993). In that order, we explained that we still adhered to the analysis contained in our *Reconsideration Order* concerning the legality of the two-step procedure.

[4] The footnote cites Sections 22.6(b)(2), 22.31(a)(ii) and (b)(2)(iii), and 22.902(b)(3), (4) and (5).

with separate ten-year license terms. Nevertheless, NewVector believes that the footnote might be misconstrued to suggest that the licensee for an unserved area market could propose to serve both the area covered by its unserved area license and the CGSA area covered by the incumbent and thus gain an advantage under the comparative renewal hearing issue which compares the geographic areas and populations served by the applicants.[5]

5. NewVector stresses that allowing an applicant who challenges an incumbent licensee to obtain such an advantage would be particularly unfair to a licensee whose five year fill-in period has long passed, because the incumbent would have had no notice that a decision not to serve some areas within an MSA or an RSA would provide a preference for a potential challenger based on chance, *i.e.*, the selection process[6] which is used to determine which unserved area application is granted.[7] Further, the petitioners assert that, given the Commission's rationale for not allowing simultaneous renewal proceedings for consolidated markets,[8] it is fundamentally unfair to hold that any unserved areas within an MSA or RSA should become the basis for a competitive advantage for a renewal challenger. In this light, petitioners request that we clarify that footnote 8 of the *Reconsideration Order* was not meant to imply that unserved area applications or authorizations will play any role in the cellular renewal process.

6. We agree with NewVector that it would be unfair to allow an applicant or a licensee for an unserved area to gain an advantage over an incumbent licensee in an MSA or RSA when both parties are participating in a comparative cellular renewal proceeding. Unserved area licenses are separate from our initial licensing of cellular markets throughout the United States and have their own separate ten-year term. Moreover, the Commission's application process, including the renewal process, is license-specific in nature. *See* paragraph 30 of our *Reconsideration Order*. Thus, the foregoing rationale for not allowing simultaneous renewals or consolidated renewal proceedings for those licensees who have consolidated their markets into wide-area service territories also supports the conclusion that unserved area licensees may not combine their grants for unserved areas with areas being considered in renewal proceedings for the initial licensees in MSAs and RSAs. Accordingly, we clarify that neither footnote 8 nor any other part of our *Reconsideration Order* is meant to imply that unserved area applications or authorizations will play any role in the cellular renewal process.

B. Requests for Procedural Changes

7. Our current rules require both renewal applicants and parties filing applications which are mutually exclusive with renewal applications to file their applications not more than 60 days and not less than 30 days prior to the expiration date of the relevant cellular license. *See* Section 22.31(j) of our Rules. In our *Reconsideration Order*, we adopted the following procedural rules. First, we require a renewal applicant to file its renewal expectancy showing within thirty (30) days of the issuance of the Public Notice announcing the filing of applications competing with a renewal application. *See* Section 22.942(a) of the Rules. Interested parties are allowed thirty (30) days after the renewal applicant has filed its renewal expectancy showing to file petitions directed against any of the applications. *See* Section 22.942(b) of the Rules. Second, after reviewing the competing applications for a cellular frequency block in a particular market, the Commission or the staff will, in most instances, designate the applications for a two-step comparative hearing. *See* Section 22.942(c) of the Rules. Third, an Administrative Law Judge will conduct a threshold hearing, in which both the licensee and the competing applicants are parties, to determine whether the renewal applicant deserves a renewal expectancy.[9]

8. If the Presiding Judge determines that the renewal applicant is basically qualified and due a renewal expectancy, the competing applicants will be found ineligible for further consideration and their applications will be denied. If the Presiding Judge determines that the renewal applicant did not merit a renewal expectancy but is otherwise qualified, then all of the applications filed for that market will be considered in a comparative hearing (step two) which follows the expedited procedures described in Section 22.916(b)(5) through (b)(8) of the Rules. In a step two hearing all the applicants will be allowed 90 days after the release of the Judge's ruling in step one to file their direct cases. Rebuttal cases would be due within 30 days after the filing of the direct cases.

9. New Section 22.942(d) of the Rules provides that a challenging applicant can request a waiver of the threshold hearing (step one) of the two-step hearing procedure and that request will be granted if the applicant demonstrates that its proposal so far exceeds the service presently being provided by the incumbent that there would be no purpose in making a threshold determination as to whether the renewal applicant deserves a renewal expectancy vis-a-vis such a competing applicant. The Commission will act upon a waiver request prior to designating the relevant applications for hearing.

10. The Joint Petition requests changes in the foregoing procedures. First, the Joint Petition claims that Section 22.942(d) of our Rules is unclear whether a separate renewal expectancy issue will be designated for step two hearings. Petitioners also question whether the renewal expectancy issue will remain the most important comparative factor in deciding step two comparative cases. To clarify our intent, we shall add language to Section 22.942(d) of the Rules to explicitly state that if a waiver of the step one hearing is granted, a renewal expectancy issue will be designated as part of the step two hearing and will remain the most important comparative factor in deciding the case.

---

[5] *See* Section 22.941(d)(1) of our Rules.

[6] The *Notice of Proposed Rule Making in PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act Competiive Bidding*, 8 FCC Rcd 7635 (1993) (*Notice)*, proposes to utilize auctions to select the winner among mutually exclusive applicants for initial cellular licensees. Nevertheless, the *Notice* explains that the Commission has the option of utilizing lotteries for applications filed prior to July 26, 1993.

[7] Petitioners claim that if licensees had been on notice, they would have provided cellular service throughout each MSA and RSA to protect their interests, even if the expenditures to achieve such goals did not make economic sense and were not based on the public's demand for service. *See* NewVector's petition at page 5, footnote 5.

[8] *See* paragraph 30 of our *Reconsideration Order*.

[9] If the order designating the applications for hearing specified any basic qualifying issues against the licensee, those issues would be tried in the threshold (step one) hearing.

11. Second, the Joint Petition requests that the licensee's renewal expectancy showing be filed after the renewal application is designated for hearing, rather than thirty (30) days after the Public Notice announcing the filing of applications as Section 22.942(a) of our Rules now provides. Petitioners observe that the *Report and Order* provided that the Commission would make a threshold determination whether the renewal applicant was entitled to a rebuttable presumption of entitlement to a renewal expectancy prior to designating the relevant applications for hearing. The *Reconsideration Order* provides that the Presiding Judge, not the Commission, will make a threshold determination on the renewal expectancy issue.

12. We reject petitioners' foregoing request as counterproductive.[10] When waiver requests are filed, we must determine whether to grant a waiver of the step one hearing prior to designating applications for comparative renewal proceedings. To make this determination, we must compare the renewal applicant's current service with that offered by applicants seeking a waiver prior to hearing. A renewal applicant's renewal expectancy showing must include a description of its current service. *See* Section 22.941(b) of the Rules. The filing schedule contained in our Rules is thus essential to our processing of mutually exclusive applications. Therefore, we deny petitioners' request.

13. Third, the Joint Petition states that our Rules do not specify the procedures which will be followed in step one hearings. The Joint Petition asks that the Commission provide for the filing of affirmative direct cases on the renewal expectancy issue ninety (90) days after the hearing designation order is released and also provide for the filing of rebuttal cases thirty (30) days after the filing of direct cases. Petitioners observe that Section 22.942 of the Rules already provides the foregoing time periods for direct and rebuttal cases in step two hearings. Further, the Joint Petition requests that we clarify that the expedited hearing procedures of Sections 22.916(b)(5)-(8) apply to step one hearings, just as they already apply to step two hearings.

14. In general, we believe that the Presiding Judge in a comparative renewal proceeding should have the discretion to specify the timetable for the submission of direct and rebuttal cases in step one hearings, especially since step one hearings will include any issues concerning the basic qualifications of an incumbent licensee. Further, we retain the authority to establish a schedule for filing direct and rebuttal cases when we designate cases for hearings if we believe such a schedule is necessary. Therefore, we shall not specify by rule a timetable for the submission of direct and rebuttal cases in step one hearings.

15. Nevertheless, since the renewal expectancy showing will constitute a licensee's direct case in step one hearings, aside from any basic qualifying issues, we wish to allow licensees sufficient time to prepare an adequate and complete renewal expectancy showing. Therefore, we shall amend Section 22.942(a) of our Rules to provide that renewal applicants will have sixty (60) days after the issuance of the Public Notice announcing the filing of competing applications to file their renewal expectancy showing, rather than the thirty (30) days now specified in the Rules. We note that another reason for this rule revision is that incumbent licensees should not have to prepare a renewal expectancy showing unless challenging applications are filed. Sixty days should give a licensee enough time to prepare its showing. Further, in order to clarify our original intent, we shall revise the wording of Section 22.942(f) of our Rules to state specifically that the expedited hearing procedures of Sections 22.916(b)(5)-(8) of our Rules apply to step one hearings as well as step two hearings.

16. Fourth, the Joint Petition asks that an applicant requesting a waiver of the threshold hearing (step one hearing) be required to file that waiver request at the same time its companion application is due. The Joint Petition observes that permitting such waiver requests at a later point in time would give challengers an opportunity to tailor their service proposals in ways that would exceed the incumbent licensee's service record. Further, the Joint Petition requests that parties be allowed to file petitions against such waiver requests when petitions to deny the challengers' applications are due.[11] Pursuant to Section 22.942(b) of our Rules, interested parties have 30 days from the date that the renewal applicant submits its renewal expectancy showing to file petitions to deny any of the mutually exclusive applications in a comparative cellular renewal proceeding. Thus, a renewal applicant will have 30 days after it files its own renewal expectancy showing to file a petition to deny against a competing application.

17. Southwestern Bell suggests that the Commission specify that incumbents have 60 days to respond to a request for a waiver because preparing such a response could take more time than the preparation of an "ordinary" petition to deny, especially in the larger markets. A petition to deny will frequently focus on a single issue and be based on facts previously known to the petitioner. Southwestern Bell contends, whereas preparing a response to a waiver request will require the renewal applicant to review a competing application for an entire proposed cellular system. McCaw supports adopting rule clarifications governing the timing of the waiver request filing and the incumbent's opportunity to respond. Whatever schedule we adopt, McCaw stresses, should give the incumbent licensee a meaningful opportunity to evaluate and comment on any waiver request.

18. We grant the Joint Petition's request. We believe that the conduct of comparative renewal proceedings would be expedited by requiring challenging applicants to file requests for waiver of step one hearings at the time they file their applications and by allowing other parties to respond to those requests at the same time that petitions to deny any of the applications are filed. Therefore, we shall make appropriate changes to Section 22.942(d) of our Rules in order to implement such rule revisions. We deny Southwestern Bell's request, however, that parties be allowed an additional thirty (30) days to file petitions against requests for waiver of the step one hearing. We note that our revised version of Section 22.942(d) of our Rules will allow interested parties thirty (30) days after the renewal applicant submits its renewal expectancy showing to file petitions against requests for waiver of the step one hearing.

---

[10] As discussed below, however, we do amend Section 22.942(a) of the Rules for other reasons. *See* paragraph 15.

[11] The Joint Petition also requests that challengers be required to serve incumbent licensees with copies of their applications and waiver requests. We shall deny this request. Both challengers and licensees may review and obtain copies of their opponents' applications and waiver requests once they are placed in our public files.

Nevertheless, since renewal expectancy showings will not be due for 60 days after the issuance of the Public Notice announcing the filing of renewal applications and competing applications (which will include any waiver requests), parties wishing to file petitions against step one waiver requests will have several months after the waiver requests are filed to prepare their petitions.

C. Reporting Obligations

19. The Joint Petition observes that the Commission, in its *Reconsideration Order*, removed the third renewal expectancy criterion which required that a licensee must not have engaged in "substantial relevant misconduct," which was defined generally as non-FCC misconduct, and declared that only disqualifying non-FCC misconduct is germane to the license renewal process. Nevertheless, Section 22.941(b)(4) of the Commission's rules still requires licensees to submit information concerning "relevant non-FCC misconduct" as part of their renewal expectancy showings. Petitioners request that the foregoing disclosure requirement be deleted.

20. Since relevant non-FCC misconduct will no longer be considered as part of a licensee's renewal expectancy showing, we shall eliminate the language of Section 22.941(b)(4) of our Rules requesting the disclosure of non-FCC misconduct as part of a licensee's renewal expectancy showings. Nevertheless, we shall retain the language of Section 22.941(b)(4) requiring a renewal applicant to provide copies of orders which find the licensee, or certain parties to the licensee, guilty of FCC misconduct as part of its renewal expectancy showing because such misconduct is relevant to determining whether a renewal applicant deserves a renewal expectancy.

21. Petitioners also object to the character reporting requirements set forth in footnote six of the *Reconsideration Order*. On August 18, 1993, the Commission released an Order, FCC 93-402, suspending enforcement of these character reporting requirements pending disposition of the petitions for reconsideration of that order. In our August 18th Order, we noted the apparent industry confusion concerning those requirements[12] and explained that suspending enforcement of the disclosure requirements would permit these issues to be considered more fully on reconsideration. CTIA, BellSouth, GTE, and Southwestern Bell have filed Further Comments concerning the character reporting requirements for cellular renewal applicants. In general, several petitioners believe the reporting requirements set forth in footnote 6 are overly extensive and inconsistent with information collected from other Part 22 applicants. CTIA observes that the Commission already obtains character information from cellular radio applicants on FCC Form 401 (for new systems or major modifications thereto), and FCC Form 490 (for Commission consent to the transfer of control or assignment of system licenses). CTIA argues that requiring renewal applicants to compile and file the data required by footnote six as part of FCC Form 405 (for renewal of license), while not requiring similar information of applicants for new cellular facilities (on FCC Form 401) or applicants seeking to acquire existing cellular facilities (on FCC Form 490), is arbitrary and capricious because there is no basis for imposing more extensive reporting requirements on renewal applicants. CTIA and BellSouth also argue that the reporting requirements are overbroad and their adoption was not in compliance with the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. Section 553.

22. The issue of what character reporting requirements should be imposed on cellular renewal applicants and other Part 22 applicants can best be resolved in a broad rule making proceeding and not on reconsideration of our cellular renewal rules. In this light, we vacate the character reporting requirements set forth in footnote six of our *Reconsideration Order*.[13] The instructions to the renewal application form (FCC Form 405) do not specifically require the submission of any character information concerning the renewal applicant. Nevertheless, a Public Notice entitled "Information Regarding Cellular Renewal Applications," Report No. CL-93-129, released by the Common Carrier Bureau on August 5, 1993, states that a renewal applicant, in response to item 8 of FCC Form 405, must reference its most recently filed FCC Form 401 or FCC Form 430 by file number, date filed, and any other identifying information. Further, the Public Notice requires that if there have been changes in the information submitted since the referenced form was filed, the renewal applicant must indicate those changes in a separate exhibit. Both FCC Form 401 and FCC Form 430 ask relevant questions concerning the general character qualifications of the applicant. We hereby affirm the requirements set forth in that Public Notice as to what information a renewal applicant should submit in response to Item 8 of FCC Form 405.

III. ORDERING PARAGRAPHS

23. Accordingly, IT IS ORDERED That the "Petition for Limited Clarification," filed by U S WEST NewVector Group, Inc. IS GRANTED and that the "Joint Petition for Clarification and Further Reconsideration," filed by BellSouth Corporation, BellSouth Enterprises, Inc., BellSouth Cellular Corporation and GTE Corporation IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

24. IT IS FURTHER ORDERED That the amendments to Part 22 made herein ARE ADOPTED and WILL BECOME EFFECTIVE 60 days after publication in the Federal Register.

25. IT IS FURTHER ORDERED That the stay imposed by our *Reconsideration Order* on the effectiveness of Section 22.942 of our Rules IS VACATED.

---

[12] The Commission's staff had issued a Public Notice entitled "Information Regarding Cellular Renewal Applications," Report No. CL-93-129 on August 5, 1993, which stated that renewal applicants must comply with the disclosure requirements set forth in footnote six of our *Reconsideration Order*. In a letter to the staff dated August 13, 1993, eight cellular carriers and CTIA explained that the referenced Public Notice appeared to require, for the first time, the submission of certain information by all renewal applicants at the time they filed their renewal applications. Thus, many carriers had assumed, prior to the release of that Public Notice, that footnote six was referring to renewal expectancy showings, which are required after renewal applications and any challenging applications have been filed, rather than to renewal applications themselves. *See* Further Comments of CTIA, p. 3.

[13] We do not vacate the first sentence of footnote six, which merely states that the real parties in interest in a Part 22 application must be disclosed.

26. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Revised Rules

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. Sections 154, 303.

2. Section 22.941 is amended by revising paragraph (b)(4) to read as follows:

Section 22.941 Criteria for comparative cellular renewal proceedings.

* * * * *

(b) * * *

(4) Copies of all Commission orders finding the licensee to have violated the Communications Act or any Commission rule or policy, and a list of any pending proceedings that relate to any matter described above.

* * * * *

3. Section 22.942 is revised to read as follows:

Section 22.942 Procedures for comparative renewal proceedings.

The following procedures shall apply to comparative renewal proceedings in the Domestic Public Cellular Radio Telecommunications Service:

(a) Within sixty (60) days of the issuance of the Public Notice announcing the filing of a renewal application and applications competing with that renewal application, the renewal applicant must file an original and four copies of its renewal expectancy showing with the Commission.

(b) Interested parties have thirty (30) days from the date that the renewal applicant submits its renewal expectancy showing to file petitions to deny any of the mutually exclusive applications. Applicants have fifteen (15) days to file replies; no further pleadings will be accepted.

(c) In most instances, the renewal application and any competing application(s) will be designated for a two-step hearing procedure. An Administrative Law Judge will conduct a threshold (step one) hearing, in which both the licensee and the competing applicants will be parties, to determine whether the renewal applicant deserves a renewal expectancy. If the order designating the applications for hearing specifies any basic qualifying issues against the licensee, those issues will be tried in this threshold (step one) hearing. If the Presiding Judge determines that the renewal applicant is basically qualified and due a renewal expectancy, the competing applicants will be found ineligible for further consideration and their applications will be denied. If the Presiding Judge determines that the renewal applicant does not merit a renewal expectancy but is otherwise qualified, then all the applications filed for that market will be considered in a comparative hearing (step two) which follows the expedited procedures described in Section 22.916(b)(5) through (b)(8) of the Rules.

(d) If a competing applicant demonstrates that its proposal so far exceeds the service presently being provided that there would be no purpose in making a threshold determination as to whether the renewal applicant deserved a renewal expectancy vis-a-vis such a competing applicant, such a competing applicant may request a waiver of the threshold hearing (step one) of the two-step hearing procedure. Such a waiver request must be filed at the time the requestor's application is filed. Petitions opposing such waiver requests must be filed within thirty (30) days after the renewal applicant has filed its renewal expectancy showing. Replies to such petitions must be filed within 15 days of the petitions; no further pleadings will be accepted. If a request to waive the step one hearing is granted, the renewal expectancy issue will be designated as part of the step two hearing and will remain the most important comparative factor in deciding the case, as provided in Section 22.941(a).

(e) If the Presiding Judge issues a ruling in the step one hearing which denies the licensee a renewal expectancy, all the applicants involved in the proceeding will be allowed 90 days after the release of the Judge's ruling in step one to file their direct cases. Rebuttal cases must be filed within 30 days after the filing of the direct cases.

(f) The Presiding Judge shall use the expedited hearing procedures delineated in Sections 22.916(b)(5) through (b)(8) of the Rules in both step one and step two hearings conducted in comparative cellular radio renewal proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2363

Revisions to Tariff F.C.C. No. 69

ORDER

Adopted: August 12, 1994; Released: August 15, 1994

By the Chief, Tariff Division

1. Southwestern Bell Telephone Company (SWB) filed Transmittal 2363 on June 17, 1994 proposing to make modifications to its route diversity offering filed under Transmittal No. 2337 and to modify current regulations in its Special Construction Tariff F.C.C. No. 69. Transmittal 2363 is scheduled to take effect on August 16, 1994. MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate the special construction revisions contained in Transmittal 2363 and SWB filed a reply.

2. The transmittal provides that SWB will specially construct facilities to be used where facilities and equipment are not available for DS1 and DS3 route diversity. Customers will pay all nonrecoverable special construction costs up front that are in excess of $25,000 for all new special construction cases filed after the effective date of the transmittal. Specifically, Transmittal 2363 provides that customers pay one-half of the up front charges prior to the start of the special construction, with the balance due upon completion of the work, and before service commences. SWB also proposes that customers incurring special construction costs of $25,000 or less would not incur any charges.[1]

3. MCI opposes the imposition of mandatory up front payment of the nonrecoverable costs in excess of $25,000, although it does not object to a provision that permits customers to make a voluntary payment of such costs.[2] It contends that SWB will be able to double recover its special construction costs through the up front payment and the recurring charges imposed on its customers for these facilities. According to MCI, double recovery occurs because tariffed recurring charges already recover the direct costs of providing the service. MCI also maintains that SWB has not shown that a change in the existing capital recovery procedures are necessary in order for SWB to make more efficient or timely use of its investment capital. According to MCI, SWB's parent company has sufficient funds in which to invest in necessary telephone company-related construction projects, including special construction, so there is no need for the mandatory up front payment.

4. In response, SWB denies that Transmittal No. 2363 provides for double recovery of costs for special construction. It states that the recurring monthly charge that MCI claims creates the double payment applies only to the facilities specially constructed for those routes or types other than normal and does not apply to construction of basic facilities. Therefore, according to SWB, no double recovery can occur since there is no special construction recurring charge on basic facilities. SWB filed Transmittal No. 2372[3] on July 21, 1994, to clarify that the up front payment will not lead to the double recovery of costs. As for MCI's claims that SWB's parent company has sufficient funds for construction, SWB asserts that only a portion of its parent company's funds is designated for SWB infrastructure use.

5. We have reviewed the tariff filed by SWB, the petition to reject or suspend and investigate Transmittal No. 2363 filed by MCI and SWB's reply. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate SWB Tariff F.C.C. No. 69, Transmittal No. 2363 filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] SWB Transmittal No. 2363, Description and Justification at 2-3.
[2] MCI has no other objections to the transmittal. MCI Petition at n.7.
[3] No petitions were filed against Transmittal 2372.

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

ORDER ON RECONSIDERATION

Adopted: August 15, 1994; Released: August 15, 1994

By the Commission:

INTRODUCTION

1. On our own motion, pursuant to 47 C.F.R. § 1.108, we reconsider two aspects of the competitive bidding rules adopted for personal communications services in the 2 GHz band ("broadband PCS").[1] First, the Commission amends Section 24.720(l) to exempt from the affiliation rules, for purposes of eligibility to apply for licenses in frequency blocks C and F ("entrepreneurs' blocks"), entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations. As recognized by Federal law and the Small Business Administration ("SBA") in its rules, these entities are inherently economically disadvantaged. We believe that these minority groups should be eligible to bid in the entrepreneurs' blocks, along with other designated entities, despite their affiliation with entities owned by tribes or the statutorily created and regulated Alaska Native corporations, which may have revenues pr assets that exceed the general limits for eligibility in the entrepreneurs' blocks.

2. Second, we amend our rules governing attribution of gross revenues, total assets and personal net worth to establish an applicant's financial eligibility for the entrepreneurs' blocks. We will permit nonattributable investors in a corporate applicant to own up to 15 percent of the corporation's voting stock, provided that (as the rules still require) the applicant's control group retains at least 25 percent of the equity and 50.1 percent of the voting stock. This change applies the same attribution rules for investors in publicly-traded corporate applicants to investors in corporate applicants that are not publicly traded. Introducing this additional flexibility into our attribution rules will attract investment to all types of corporations controlled by entrepreneurs' block eligibles and increase the level of participation by smaller corporate applicants that have decided against making a public offering of their stock.

AFFILIATION RULES

3. In the *Fifth Report and Order*, the Commission adopted rules providing that gross revenues, assets and personal net worth of affiliates of a broadband PCS applicant are attributed to the applicant and counted toward certain eligibility criteria.[2] These affiliation requirements are intended to prevent entities that, for all practical purposes, do not meet the Commission's size standards from receiving benefits targeted to smaller entities.[3] These safeguards ensure, pursuant to Section 309(j)(3) of the Communications Act, that *bona fide* designated entities are provided with meaningful economic opportunities to participate in the provision of spectrum-based services.[4] Generally, affiliation arises when the applicant (or an attributable investor in the applicant) controls or has power to control another entity or if the applicant (or an attributable investor in the applicant) is under the control of the other entity. In developing its affiliation rules, the Commission borrowed from rules that are used by SBA to make size determinations, including guidelines used to establish when a firm should be deemed an affiliate of an applicant and other safeguards designed to ensure that only qualified entities are eligible for special benefits under the SBA's "section 8(a)" program.[5]

4. The Commission failed, however, to adopt an exemption in the SBA's rules that excluded from affiliation coverage entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations.[6] SBA is required by statute generally to determine the size of a small business concern owned by an Indian tribe (or a wholly owned business entity of such tribe) "without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe."[7] Under this statute, and others, "tribally-owned concerns" are considered "unique aggregations"[8] and provided special access to government benefits because of their status as economically disadvantaged.[9] In addition, Section 29(e) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1626(e)) provides that:

---

[1] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order* in PP Docket No. 93-253, FCC No. 94-178, released July 15, 1994, 9 FCC Rcd _____ (1994); 59 Fed. Reg. 37566 (July 22, 1994) (*"Fifth Report and Order"*).

[2] *See id.* at Appendix B, Sections 24.709, 24.720(b), 24.720(e).

[3] *See id.* at ¶ ¶ 156-168, 201.

[4] *See id.* at ¶ ¶ 93-112.

[5] *Id.* at ¶ ¶ 201-217.

[6] *See* 13 C.F.R. § 121.401(b); *see also id.* §§ 121.1102(a), 124.112(c).

[7] 15 U.S.C. 636(j)(10)(J)(ii). The term "Indian tribe" defined in 25 U.S.C. § 450b(e) includes "any Indian tribe, band nation, or other organized groups or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See also* 15 U.S.C. § 632(d) (defining "Qualified Indian tribe" for purposes of the Small Business Act; 25 C.F.R. Part 83 (Department of the Interior procedures for establishing that an American Indian group exists as an Indian tribe).

[8] *See, e.g.*, United States v. Antelope, 430 U.S. 641, 645 (1977); Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, *et seq.*

[9] *See e.g.* Indian Financing Act, 25 U.S.C. § 1451 *et seq.*; Buy Indian Act, 25 U.S.C. § 47 *et seq.*; and 25 U.S.C. §§ 13, 109, 218, 404 (U.S. Bureau of Indian Affairs grants and guaranteed loan programs).

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both--

(A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

The SBA has incorporated these statutory provisions into its regulations.[10]

5. We have reexamined our eligibility and affiliation rules and will make an amendment to these rules that is more consistent with the other Federal laws, policies and regulations cited above so as not to preclude the eligibility of entities owned and controlled by Indian tribes and Alaska Native Corporations for entrepreneurs' block licenses and for the benefits accorded businesses owned by members of minority groups. We believe that adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations for purposes of eligibility in the entrepreneurs' blocks is consistent with these other Federal policies[11] and complies with the congressional mandate in the auction law.[12]

6. Specifically, this exemption will ensure that the congressional policies of ensuring that minority-owned businesses have the opportunity to participate in spectrum-based services will apply to a class of designated entities, Indian tribes and Alaska Native Corporations, that Congress has determined to be economically disadvantaged. As noted above, Indian tribes and Alaska Native Corporations are unique aggregations of very limited capital of historically disadvantaged people.[13] Moreover, in the promotion of Native American "self-determination," the Federal government has a "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."[14] Finally, without the exemption we adopt herein, the Commission would not be able to ensure that all classes of designated entities are provided meaningful opportunities to participate in broadband PCS spectrum auctions.

7. We note that Section 7(j)(10)(J) of the Small Business Act gives the SBA the discretion to consider tribal and other affiliations if it determines that one or more such tribally owned businesses have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.[15] We do not believe it is necessary to make such a determination for broadband PCS auctions.[16] The limited potential number of broadband PCS applicants that may benefit from this affiliation exemption will not present any unfair advantage to other eligible applicants that have had gross revenues up to $125 million and assets of up to $500 million. In addition, this exemption from the affiliation rules applies only to applicants for entrepreneurs' block licenses owned and controlled by Indian tribes and Alaska Native Corporations, not independent entities composed of individual Native Americans or other entities owned by members of this minority group. Thus, such entities will not have any unfair advantage over other minorities in the entrepreneurs' blocks.

ATTRIBUTION RULES

8. As referenced in the above discussion, the *Fifth Report and Order* limited eligibility for the entrepreneurs' blocks to companies that have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time of filing.[17] In addition, no attributable investor or affiliate could have $100 million or more in personal net worth.[18] For purposes of determining eligibility, we attribute to the applicant the gross revenues, assets and net worth of certain investors and affiliates. We adopted the attribution and affiliation rules to prevent ineligible parties from exerting undue control over firms eligible to apply for entrepreneurs' block licenses and to ensure that only *bona fide* applicants receive broadband PCS licenses. At the same time, we recognized that passive investment in entrepreneurs' block applicants would be critical to the successful development of these smaller com-

---

[10] *See Small Business Size Standards*, 54 Fed. Reg. 52634, 52635 (Dec. 21, 1989) (amending 13 C.F.R. §§ 121.401(b)); *Small Business Size Regulations; Minority Small Business and Capital Ownership Development*, 59 Fed. Reg. 12811 (March 18, 1994) (amending 13 C.F.R. §§ 121.1102(a), 124.112(c)).

[11] *C.f. LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974).

[12] *See* 47 U.S.C. § 309(j)(4)(D), (3)(B).

[13] *See, e.g.*, H.R. Rep. No. 907, 93d Cong., 2d Sess. (1974) (Indian Financing Act); *see also* Letter to Honorable Reed E. Hundt, Chairman, Federal Communications Commission, from Roy M. Hunndorf, President, Cook Inlet Region, Inc., July 16, 1994; *see also* Testimony of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc., before the Subcommittee on Minority Enterprise, Finance and Urban Development, U.S. House of Representatives, May 20, 1994.

[14] 25 U.S.C. § 450a(b) (Congressional declaration of policy, Indian Self-Determination and Education Assistance Act). *See also Morton v. Mancari*, 417 U.S. 536, 555 (1974).

[15] 15 U.S.C. § 636(j)(10)(J)(ii)(II).

[16] We will retain the discretion, on a service-specific basis, to determine whether providing this exemption from similar affiliation rules applicable to other auctionable services would give these entities a substantial unfair competitive advantage.

[17] *Fifth Report and Order*, ¶ ¶ 118-128, 156-157, Appendix B, Section 24.709.

[18] *Id.*

panies. To balance these competing considerations, we decided not to attribute investors in corporate applicants that own a 25 percent or less passive equity interest.[19]

9. Passive equity in a corporate applicant was defined to include non-voting stock and no more than 5 percent of the voting stock.[20] An exception was created, however for evaluating a publicly-traded corporation's financial eligibility in the entrepreneurs' blocks: an investor's ownership of no more than 15 percent of the voting stock in a publicly-traded corporate applicant would be considered passive equity. We raised the attribution level to 15 percent in this instance because we found the 5 percent voting stock rule would cause hardship to publicly-traded companies, where the stock is widely held and there is little ability to control insubstantial stock ownership.[21]

10. We now believe that investors in all corporate applicants, including those that are not publicly traded, should be able to include in their 25 percent passive equity investment up to 15 percent of the applicant's voting stock. Both publicly traded and non-publicly traded applicants would have difficulty attracting substantial investment if each individual investor could own no more than 5 percent of the voting stock. Investors that are prepared to devote considerable funds to an entrepreneurs' block applicant should reasonably expect to exercise some ability to protect their investment through a modest level of voting stock ownership. The 15 percent voting stock limit would, in this respect, not rise to the level of a controlling interest, but, from the investor's perspective, could diminish the substantial risks associated with committing funds to a PCS applicant and enhance the potential rewards for providing start-up capital to these new ventures.

CONCLUSION

11. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules is amended as set forth in the attached Appendix A.

12. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

FINAL RULES

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.709 is amended by removing paragraph (b)(4)(iii) and revising paragraph (e) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

* * * * *

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, gross revenues, members of minority groups, passive equity, personal net worth, and total assets* used in this section are defined in § 24.720.

3. Section 24.711 is amended by revising paragraph (a)(4) to read as follows:

§ 24.711 Installment payments for licenses for frequency Blocks C and F.

(a)* * *

(4) For purposes of determining whether an applicant has $75 million or less in gross revenues, gross revenues shall be attributed to the applicant and aggregated as provided in § 24.709(b).

* * * * *

4. Section 24.720 is amended by revising paragraphs (b)(2) and (j), by adding a new paragraph (l)(11) and by removing paragraph (m) to read as follows:

§ 24.720 Definitions.

* * * * *

(b)* * *

(2) For purposes of determining whether an entity meets the $40 million gross revenues and $40 million personal net worth standards in paragraph (1), gross revenues and personal net worth shall be attributed to the entity and aggregated as provided in § 24.709(b).

---

[19] *Id.* at Appendix B, Section 24.709(b)(4).
[20] *Id.* at ¶ 158; Appendix B, § 24.720(j).
[21] *Id.* at ¶ 163.

* * * * *

(j) *Passive Equity. Passive equity* shall mean (i) for corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

* * * * *

(l)* * *

(11) Exclusion from affiliation coverage. For purposes of § 24.709, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant owned and controlled by such tribes or corporations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Fisher Broadcasting, Inc.,
Licensee of Station KOMO-TV,
Seattle, Washington

For Declaratory Ruling

STAFF RULING

Adopted: August, 26, 1994; Released: September 2, 1994

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed by Fisher Broadcasting Inc. ("Fisher"), licensee of station KOMO-TV, Seattle, Washington. Fisher asks us to rule that news interviews broadcast on three of its public affairs programs are exempt from the "equal opportunities" provision of Section 315(a) of the Communication Act of 1934, as amended. Fisher contends that "Town Meeting," "Northwest Afternoon," and "Viewpoint," contain bona fide news interviews satisfying the Commission's criteria for exemption under Section 315(a).

2. Fisher states that "Town Meeting" is a locally produced, weekly, hour-long program that deals with controversial issues affecting life in KOMO-TV's service area. Fisher asserts that each episode features interviews of one or more guests, usually community leaders, by a program host. After initial discussion, questions are taken from a studio audience and from viewers who call in. Fisher maintains that the host controls the flow of questions as well as the selection of topics, and that speech making is not allowed. KOMO-TV has broadcast "Town Meeting" for more than ten years.

3. Fisher states that "Northwest Afternoon" is a one hour program that it has produced for broadcast each weekday for more than seven years. The program is divided into two distinct segments. The first segment is approximately fifteen minutes in length and reviews events in serial daytime drama shows. No ruling is requested with respect to this portion of the program. Fisher asserts that the remainder of the program consists of interviews with newsworthy guests. Fisher states that two hosts interview one or more guests concerning various important public issues. Questions are taken from both the studio audience and the from call-in viewers. However, Fisher contends that the hosts maintain control over the questions and the discussion, and that speech making is not allowed.

4. Finally, Fisher states that "Viewpoint" is a thirty minute weekly news and public affairs program that focuses on regional issues of public importance. During the program, a regular host interviews various political, community, and business leaders to solicit their viewpoints on a variety of issues. The host selects and asks the questions, and there is no studio audience. "Viewpoint" has been regularly broadcast for over a decade. As with the two programs described above, Fisher states that all topics and participants on "Viewpoint" are selected on the basis of the station's ascertainment results, viewer letters, and the station's journalistic judgement. Fisher maintains that no program is ever broadcast for the purpose of promoting a particular candidacy or political party.

DISCUSSION

5. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other such candidates for that office. In 1959, Congress amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to politicalconventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1-4). In determining whether a program qualifies as a "bona fide news interview", the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster's or independent producer's decisions on format, content, and participants are based on newsworthiness rather than on an intention to advance an individual's candidacy. *See Request for Declaratory Ruling on Independently Produced News Interviews*, 7 FCC Rcd 4681 (1992).

6. Based on the information contained in Fisher's request, it appears that the news interview segments of "Town Meeting," "Northwest Afternoon," and "Viewpoint" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). Each program has been regularly scheduled for several years. In addition, Fisher represents that it retains control over the programs' topics, hosts, and guests, and that no speech making is allowed. Moreover, according to Fisher, all topics and participants are selected on the basis of newsworthiness in the exercise of the producer's reasonable good faith judgment, with no intent to further any candidacy.

CONCLUSION

7. In view of the foregoing considerations, Fisher's request that the bona fide news interview segments on "Town Meeting," "Northwest Afternoon," and "Viewpoint" be exempt from Section 315(a) of the Communications Act IS GRANTED.[1]

8. Staff action is taken pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

[1] The exemption would apply only to appearances by guests on the programs. The appearance of any host who was a legally qualified candidate would not be exempt. *See Branch v. FCC*, 824 F.2d 37 (1987), *cert. denied*, 108 S. Ct. 1220 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-93

In the Matter of

Amendment of Subpart E of Chapter 1
of the Commission's Rules Governing
Procedures to Be Followed When
Informal Complaints Are Filed Against
Common Carriers

NOTICE OF PROPOSED RULEMAKING

Adopted: August 11, 1994; Released: September 2, 1994

Comment Date: October 24, 1994
Reply Comment Date: November 8, 1994

By the Commission:

INTRODUCTION

1. This Notice of Proposed Rulemaking solicits comments on proposed changes to the procedures that govern informal complaints filed against common carriers pursuant to Section 208 of the Communications Act of 1934, as amended,[1] ("Act") and Sections 1.716-1.718 of the Commission's rules.[2] Our goal in initiating this proceeding is to make the informal complaint process more accessible and responsive to the public by clarifying and streamlining our rules. We propose to modify certain filing and notice requirements in order to meet our commitment to the prompt resolution of informal complaints. These modifications are intended to help the general public in preparing written informal complaints, improve the procedure by which informal complaints are handled by the staff, harness staff resources to resolve informal complaints more efficiently, and eliminate unnecessary filings of formal complaints prior to the disposition of informal complaints.

BACKGROUND

2. Section 208 of the Act permits any party to file a complaint against a common carrier for acts or omissions that violate either the Act or a Commission rule or order. 47 U.S.C. § 208. We last revised our rules governing informal complaints in 1986.[3] *See Amendment of Subpart E of Chapter 1*, 104 FCC 2d 12 (1986) (*1986 Rules Revision*). These revisions were designed to achieve more efficient and expeditious processing of informal complaints by eliminating duplicate filing requirements, streamlining certain notice requirements, describing the specific remedies available to complainants and clarifying form and content requirements of complaints.[4]

3. After nearly eight years of experience under the current rules, we have observed several trends that we believe warrant certain modifications of these rules. Since the 1986 revisions, both the number and complexity of informal complaints against common carriers have steadily increased. We have found that in many cases, complainants fail to include in their initial submission important factual information that would help the staff to assess the complaints more quickly and direct them to the appropriate carrier or carriers for resolution.[5] Incomplete filings delay the processing of complaints while the staff obtains missing information and, consequently, also delay satisfaction or resolution of the complaints. In addition, we have found that complainants in some cases have filed formal complaints pursuant to Sections 1.721-1.735 of the rules[6] prior to final processing or disposition of their informal complaints by the staff. It appears that parties file such complaints because a literal reading of the current rule requires such a filing to continue prosecution of the complaint. These filings impose unnecessary burdens on complainants, carriers and the staff. Therefore, in light of these and other drawbacks, we propose to revise the informal complaint rules to create a more efficient process. We believe that the proposed changes will benefit the public, carriers, and the Commission. We invite interested persons to comment on our proposals and to identify any other revisions that may facilitate the filing and processing of informal complaints. The full text of the proposed rules is set forth in the attached appendix.

DISCUSSION

Section 1.716 Form

4. Under Section 1.716 of the Commission's Rules, all informal complaints must be in writing and "contain a complete statement of facts tending to show that [a] carrier did or omitted to do anything in contravention of the Communications Act...." We propose to amend this section to clarify that informal complaints may be filed against common carriers for violations of the Commission's rules or orders as well as the Act. The amended provision conforms the text of this rule to the intent of Section 208 of the Act.[7] We further propose to revise this section to require specifically that informal complaints include factual allegations that, if assumed to be true, would support a finding that the subject carrier has violated a provision of the Act or Commission rules or orders. Under our current rules, some informal complainants fail to allege facts that,

[1] 47 U.S.C. § 208.
[2] 47 C.F.R. §§ 1.716-1.718.
[3] We recently amended our rules regarding formal complaints. *See* Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, 8 FCC Rcd 2614 (1993).
[4] *1986 Rules Revision*, 104 FCC 2d at 12-13.
[5] In some cases, complainants challenging a charge or rate for telephone service do not file with their complaint copies of the bill or other pertinent information that the staff needs to resolve the complaint.
[6] 47 C.F.R. §§ 1.721-1.735. Pursuant to Section 1.718, an informal complainant has the right to file a formal complaint based on an unsatisfied informal complaint.
[7] *See* 47 U.S.C. §§ 208(a) and (b).

even if true, would sustain a finding that the subject carrier has violated the Act or Commission rules or orders. The proposed provision should provide helpful guidance to the general public in preparing written informal complaints. More detailed complaints will enable FCC staff to assess the merits of complaints more quickly, thereby facilitating full satisfaction or resolution within the shortest possible time-frame. The proposed change should provide our staff with the necessary information about the informal complaints at the time they are filed and reduce the need for the staff to contact complainants to obtain additional information. Thus, the record should be developed sooner under our proposed rules than under our current rules. The inclusion of more specific factual information in the initial informal complaint also should aid the carriers in their efforts to answer or satisfy informal complaints.

5. In addition, we propose to amend Section 1.716 to add a new subsection (b). The proposed revision would explicitly encourage complainants to file both an original informal complaint as well as one copy for each carrier named in their informal complaints. We especially encourage commercial complainants that have access to copying machines to file copies of these documents. In FYs 1992 and 1993, the staff served approximately 13,000 informal complaints on common carriers. Many of these were directed against multiple carriers, but were filed without copies to serve on all of the carriers named in the complaint. These filing practices require substantial staff resources to copy complaints so that each carrier named in the informal complaints can be served. Therefore, we propose to encourage complainants to file an original plus one copy of the complaint for each carrier named in their informal complaint. We believe that multiple copies of informal complaints will greatly reduce the clerical burden in preparing complaints for processing and will result in speedier processing of informal complaints.

6. Complaints involving billing disputes are often filed without copies of relevant billing statements. As a result, the staff in these cases must contact the complainants by telephone or letter to obtain pertinent billing information. This can be a time-consuming process, which delays the complaint's resolution. Therefore, we propose to revise Section 1.716 by adding subsection (c), which would explicitly encourage complainants to file a copy of the pertinent bill(s) when the complaint involves a billing dispute. We believe that the proposed rule will enable the Commission to reassign substantial resources from administrative functions, *i.e.* copying and collating copies, to direct enforcement functions such as analyzing and resolving informal complaints. This reassignment of resources should accelerate disposition of informal complaints to the benefit of complainants.

Section 1.717 Procedure

7. Section 1.717 currently states that the Commission will forward informal complaints to the appropriate carrier for investigation. In actual practice, however, the Commission conducts the investigation of informal complaints. We propose to revise Section 1.716 to state that the function of carriers in informal complaint proceedings is to satisfy or answer the written allegations.

8. In addition, we propose to revise Section 1.717 further, by eliminating the Commission's discretion to close certain informal complaints without further contact with the carrier and the complainant. The staff routinely provides notice to both complainants and carriers when it disposes of a complaint. The proposed change would conform the rule to our existing practice by requiring the staff to advise the complainant and the carrier in writing of the disposition of an informal complaint in every case.

Section 1.718 Unsatisfied Informal Complaints; Formal Complaints Relating Back to the Filing Dates of Informal Complaints

9. Section 1.718 currently states that a complainant that is not satisfied with a carrier's resolution of an informal complaint must file a formal complaint within six months of the carrier's report in order to continue prosecution of the complaint and to continue to use the filing date of the informal complaint for statute of limitation purposes. Section 1.718 was intended to prevent expiration of the two-year limitation period on claims for damages during the pendency of the informal complaint process. As currently drafted, Section 1.718 literally read, states that informal complaints are deemed to be abandoned, or a complainant's right to file a formal complaint can be extinguished, if the formal complaint is not filed within six months after the carrier has filed its report in the informal complaint proceeding. In many instances, this has required the filing of formal complaints even if the staff's investigation of the informal complaint is still in progress. In addition, Section 1.718 currently places on complainants the burden of calculating the deadline for filing a formal complaint based on an unsatisfied informal complaint. Complainants may be unaware of the six month deadline and, in any event, they must still monitor the complaint proceeding for the carrier's report to determine the formal complaint deadline.

10. In order to eliminate uncertainty and unnecessary filings, we are proposing to revise Section 1.718 to state that, in all cases involving an unsatisfied informal complaint, the period of time allowed for filing a formal complaint that will relate back to the filing date of the informal complaint is sixty days after the staff has informed the parties in writing of its disposition of the informal complaint. Consumers should benefit from the proposed rule change because it provides certainty and clarity to our rule regarding the period of time allowed for filing a formal complaint based on an unsatisfied informal complaint. For example, they no longer need to calculate the limitations period for filing a formal complaint based on an unsatisfied informal complaint. Carriers also benefit from the certainty and clarity of our proposed rule because they will be relieved of the burden of determining when they are no longer required to retain informal complaint files. In practical effect, our proposed amendment of Section 1.718 expands the time in which to file a formal complaint based on an unsatisfied informal complaint in complex informal complaint proceedings because the deadline for filing such complaints occurs later in time under our proposed rules than under our current rules.

PROCEDURAL MATTERS

Ex Parte Rules - Non-restricted Proceeding

11. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See Generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Although the proposed rules change the timing and mechanics of the informal complaint process, they would not alter the level of evidentiary and legal support required of parties to such actions. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601 *et. seq.*

Paperwork Reduction

13. The following collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review under Section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3504(h)). Copies of this submission may be purchased from the Commission's copy contractor, the International Transcription Services, Inc., (ITS) 2100 M Street N.W. Suite 140 Washington, D.C. 20037 (202) 452-1422, and in Room 246 at 1919 M Street, N.W. Washington, D.C. 20554. Persons wishing to comment on this collection of information should direct their comments to Timothy Fain, Office of Management and Budget, NOB, Room 10214, Washington, D.C. 20503, (202) 395-3561. A copy of any comments filed with the Office of Management and Budget should also be sent to the following address at the Commission: Federal Communications Commission, Office of Managing Director, Paperwork Reduction Project, Washington, D.C. 20554. For further information contact William Cline at (202) 418-0210.

CONCLUSION

14. Accordingly, pursuant to Sections 1, 4(i), 201(b), 208 and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 201(b), 208 and 403, a NOTICE OF PROPOSED RULEMAKING IS ISSUED, proposing amendment of 47 C.F.R. § 1.716 *et seq.* as set forth in the Appendix.

15. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by **October 24, 1994**. Reply comments are due by **November 8, 1994**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (203) of the Federal Communications Commission, 1919 M street, N.W. Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

PROPOSED RULES

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. § 1.716 is proposed to be revised to read as follows:

§ 1.716 Form

(a) An informal complaint shall be in writing and should contain: (1) the name, address, daytime telephone number of the complainant, and the telephone number that is the subject of the complaint; (2) the name of the carrier against which the complaint is made; (3) factual allegations that, if true, are sufficient to constitute a violation of the Communications Act or Commission rules or orders by the carrier complained of; and (4) the specific relief or satisfaction sought.

(b) In addition to the original informal complaint, complainants are encouraged to file one additional copy of that complaint for each carrier named in the complaint.

(c) When a complainant is disputing a bill, the complainant is encouraged to file a copy of the bill.

3. § 1.717 is proposed to be revised to read as follows:

§ 1.717 Procedure

The Commission will send each informal complaint to each carrier named in the complaint for it to satisfy or answer the complaint. The carrier will, within such time as may be prescribed, advise the Commission in writing, with a copy to the complainant, of its satisfaction of the complaint or of its refusal or inability to do so. In all cases, the Commission will contact the complainant and the carrier(s) regarding its review and disposition of the matters raised. If the complainant is not satisfied by the carrier's response and the Commission's disposition, it may file a formal complaint in accordance with §§ 1.718 and 1.721 of this part.

4. §1.718 is proposed to be revised to read as follows:

§ 1.718 Unsatisfied informal complaints, formal complaints relating back to the filing dates of informal complaints

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission. Such claim will be deemed to relate back to the filing date of the informal complaint; Provided, that the formal complaint: (a) is filed within sixty (60) days after the date the Commission's written notification to the complainant of the Commission's review and disposition of the informal complaint is mailed; (b) makes reference to the date of the filing of the informal complaint; and (c) is based on the same cause of action as the informal complaint. The complainant will be deemed to have abandoned the unsatisfied informal complaint if no formal complaint has been filed within the sixty (60) day period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KFS WORLD COMMUNICATIONS — File No. I-T-C-94-285

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 22, 1994; Released: September 2, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of maritime mobile satellite services to the general public by KFS World Communications (KFS).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-285 IS GRANTED, and KFS is authorized to provide maritime mobile satellite service by the resale of the maritime mobile satellite service set forth in AT&T's Tariffs FCC Nos. 1, 2, 17, 18, 19, and 20, MCI's Tariff FCC No. 1, IDB Mobile Communications, Inc.'s Tariff FCC No. 1, IDB Worldcom Services, Inc.'s Tariff F.C.C. No. 1, Sprint's Tariffs FCC Nos. 1, 2, and 10, WilTel, Inc.'s Tariff FCC No. 2, LCI International's Tariffs FCC Nos. 1 and 3, COMSAT Mobile Communications' Tariff FCC No. 1 and COMSAT World Systems' Tariff FCC No. 1 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules 47 C.F.R. Part 61 for the services authorized in this Order.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement entered into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services KFS seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCI LONG DISTANCE, INC. File No. I-T-C-94-320

Application for authority to acquire and operate facilities for service between the U.S. and various overseas points.

ORDER AND AUTHORIZATION

Adopted: August 22, 1994; Released: September 2, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the points listed in the Appendix hereto by RCI Long Distamce. Inc. (RCI). Columbia Communications Corporation (Columbia) filed comments in response to RCI's application.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-320 IS GRANTED and RCI is authorized to:

a. lease from Comsat and operate 50 T-1 and 25 digital voice/data satellite circuits between appropriately licensed U.S. earth stations and appropriate INTELSAT Atlantic and Pacific Ocean satellites, and between appropriate overseas earth stations and INTELSAT Indian Ocean satellites, connecting with similar circuits between the satellites and earth stations in the countries listed in the Appendix hereto furnished by RCI's correspondents;

b. lease and operate necessary facilities in the appropriately licensed U.S. or overseas earth stations to be used in conjunction with the satellite space segment capacity;

c. lease and operate necessary domestic connecting facilities and a one-half interest in necessary overseas connecting facilities; and

d. use facilities in a, b and c above to provide RCI's regularly authorized services between the U.S. and the countries listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that our authorization of RCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendix -- that is, private lines which originate in the United States and terminate in one or more of the countries listed in the Appendix or which originate in one or more of the countries listed in the Appendix and terminate in the United States. In addition, RCI may not -- and RCI's tariff must state that RCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither RCI nor any persons or companies directly or indirectly controlling or controlled by RCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which RCI or any persons or companies controlling or controlled by RCI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

[1] Columbia's sole concern is that RCI had not identified the satellite to be used. In a letter dated January 20, 1994, RCI clarified its application to specify use of the INTELSAT system for the proposed services.

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Countries to which RCI is authorized to provide service

Afghanistan
Algeria
American Samoa
Andorra
Angola
Anguilla
Antarctica (Casey Base)
Antarctica (Scott Base)
Antigua (Barbuda)
Argentina
Armenia
Aruba
Ascension Island
Australia
Austria
Azerbaijan

Bahamas
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Belize
Benin
Bermuda
Bhutan
Bolivia
Bosnia-Herzegovina
Botswana
Brazil
British Virgin Islands
Brunei
Bulgaria
Burkina Faso
Burma
Burundi

Cameroon
Canada
Cape Verde Islands
Cayman Islands
Central African Republic
Chad
Chile
China (Peoples' Republic)
Christmas and Cocos Islands
Colombia
Comoros (Federal and Islamic)
Congo (Republic)
Cook Islands
Costa Rica
Cote d'Ivoire
Croatia
Cyprus
Czech Republic

Denmark
Djibouti
Dominica
Dominican Republic

Easter Island
Ecuador
Egypt
El Salvador
Equitorial Guinea
Estonia
Ethiopia

Faeroe Islands
Faulkland Islands
Federated States of Micronesia
Fiji Islands
Finland
France
French Antilles
French Guiana
French Polynesia

Gabon
Gambia
Georgia
Germany
Ghana
Gibraltar
Greece
Greenland
Guam
Guadeloupe
Grenada
Guantanamo (U.S. Base)
Guatemala
Guinea (Peoples' Republic)
Guinea-Bissau

Haiti
Honduras
Hong Kong
Hungary

Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy

Jamaica
Japan
Jordan

Kazakhstan
Kenya
Kiribati
Korea (Republic)
Kuwait
Kyrgyzstan

Laos
Latvia
Lebanon
Lesotho
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg

Macao
Macedonia
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta
Marshall Islands
Mauritania
Mauritius
Mexico
Midway
Moldova
Monaco
Mongolian Peoples' Republic
Montserrat
Morocco
Mozambique

Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles
Nevis
New Caledonia
New Zealand
Nicaragua
Nigeria
Niger Republic
Niue
Norfolk Island
Norway

Oman

Pakistan
Palau
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Pitcairn Island
Poland
Portugal
Qatar

Reunion Island
Romania
Russia
Rwanda

St. Helena
St. Kitts
St. Lucia
St. Pierre and Miquelon
St. Vincent and the Grenadines
Saipan
San Marino
Sao Tome
Saudi Arabia
Senegal
Serbia
Seychelles Islands
Sierra Leone
Singapore
Slovak Republic
Slovenia
Solomon Islands
Somali Republic
South Africa
Spain
Spanish Sahara
Sri Lanka
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syria

Taiwan
Tanzania
Thailand
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Turks and Caicos Islands
Tuvalu

Uganda
Ukraine
United Arab Emirates
United Kingdom
Uruguay
Uzbekistan

Vanuatu
Vatican City
Venezuela

Wake
Wallis and Futuna Islands
Western Samoa

Yemen (Republic)
Yemen (Peoples' Democratic Republic)

Zaire
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERMEDIA COMMUNICATIIONS OF FLORIDA, INC. — File No. I-T-C-94-339

Application for authority to acquire and operate facilities via the Pan American Satellite (PAS) system for service between the U.S. and various international points for provision of voice, data and video services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 22, 1994; Released: September 2, 1994

By the Chief, International Facilities Division.

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points via the Pan American Satellite (PAS) system for the provision of international voice, data and video services, IT IS HEREBY CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-339 IS GRANTED and Intermedia Communications of Florida, Inc. (ICI) is authorized to:

a. lease from PAS and operate the satellite circuits specified in Attachment A (parts a and b, respectively) between appropriately licensed earth stations in the U.S. and the PAS-1 satellite, connecting with similar circuits between the satllite and earth stations at the points listed in Attachment A, furnished by ICI's correspondents;

b. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS-1 satellite;

c. lease and operate necessary domestic connecting facilities; and

d. use said facilities to provide private line services not interconnected with the public switched networks (10 64-kbps circuits to each location) and switched services interconnected with the public switched networks (6 64-kbps circuits to each location) between the U.S. and the countries listed in Attachment A (Parts a and b, respectively) subject to any restrictions set forth in this or any other Commission order involving separate international satellite systems.

3. IT IS FURTHER ORDERED that neither ICI nor any persons or companies directly or indirectly controlling or controlled by ICI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ICI or any persons or companies controlling or controlled by ICI are parties.

4. IT IS FURTHER ORDERED that our authorization of ICI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in Attachment A -- that is, private lines which originate in the United States and terminate in one of the countries listed in Attachment A or which originate in one of the countries listed in Attachment A and terminate in the United States. In addition, ICI may not -- and ICI's tariff must state that ICI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or any of the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that one of the countries listed in Attachment A affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1 satellite.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

Applicant requests authority to establish up to ten (10) 64-Kbps voice-grade circuits between the U.S. and the countries listed below.

(a) For communications NOT INTERCONNECTED with the public switched network:

Ku band

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
British Virgin Is.
Bulgaria
Cayman Islands
Czechoslovakia
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazahkstan
Krygyzstan
Latvia
Lithuania
Luxembourg
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Fed.
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan
Yugoslavia

C band

Anguilla
Antigua
Argentina
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Suriname
Trinidad & Tobago
Turks & Caicos Is.
Uruguay
Venezuela

Applicant requests authority to aestablish up to six (6) 64-Kbps voice-grade circuits between the U.S. and the countries listed below.

(b) For communications INTERCONNECTED with the public switched network:

Ku band	C band
Albania	Bahamas
Armenia	Costa Rica
Azerbaijan	Dominican Republic
Bahamas	Netherlands Antilles
Belarus	Panama
Bulgaria	Peru
Czechoslovakia	
Estonia	
Georgia	
Hungary	
Kazakhstan	
Kyrgyzstan	
Latvia	
Lithuania	
Moldova	
Poland	
Portugal	
Romania	
Russian Federation	
Tajikistan	
Turkmenistan	
Ukraine	
United Kingdom	
Uzbekistan	

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 30, 1994

Released: September 2, 1994

Channel 17 Associates, Ltd. 1800C1-MGK
Licensee, Radio Station WDBB-TV 93020463
1102 20th Street South
Birmingham, Alabama 35205
Att: David DuBose, President of the
Corporate General Partner

Dear Licensee:

By letter of May 5, 1993, we inquired into allegations that Station WDBB-TV, Tuscaloosa, Alabama, was violating Section 73.1201 of the Commission's Rules, our station identification provision. Your reply of July 2, 1993, concedes this violation, but asserts substantial compliance with our requirement that identification announcements be made hourly, as close to the hour as feasible.

In support of your claim of substantial compliance, you state that your review of records for the six month period preceding our letter indicates that legal station identification announcements were made during 83% of your total hours of operation, that such announcements were made within 16 minutes of the relevant hour during an additional 1.6% of the hours of operation, and that such announcements were made within the half hour during an additional 5.8% of the hours of operation. This translates, you urge, into a record of 90.4% compliance with our Rules, a record that must be considered substantial compliance under your particular circumstances.

You maintain that, as a small-market station faced with intense competition from larger stations licensed to the surrounding Birmingham market, Station WDBB-TV has survived only by entering into a rebroadcast agreement with Station WTTO-TV in Birmingham. Problems with cues on the "roll-over" sheets provided by Station WTTO were the major source of station identification problems, you assert, and you have now instituted policies to avoid these problems and assure compliance with Commission Rules. While acknowledging that they do not excuse past failures, you cite your limited financial resources and your inexperienced staff as significant factors in your operation. You point as well to your history of compliance with Commission Rules as a mitigating consideration in your case.

It appears from the above that you have violated Section 73.1201 of the Commission's Rules by failing to broadcast station identification announcements during a significant portion of your broadcast hours. It appears also, however, that these violations were inadvertent, that they involved no deception of the public, and that the circumstances leading to them have been investigated and corrected. Accordingly, you are hereby ADMONISHED for this violation. Although no further action is warranted at this time, you are expected to comply with Section 73.1201 in the future. This matter will be made part of Station WDBB-TV's permanent file.

Sincerely,

Norman Goldstein, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

cc: Howard M. Weiss

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-77

In the Matter of

Billed Party Preference
for 0+ InterLATA Calls

ORDER

Adopted: August 17, 1994; Released: August 18, 1994

By the Chief, Common Carrier Bureau:

1. On August 12, 1994, Capital Network System, Inc. filed a motion for extension of time to file reply comments to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Reply comments are scheduled to be filed by August 31, 1994 and Capital Network seeks an extension until September 23, 1994.[2]

2. Capital Network gives two reasons for its request. First, it states that not only were a large number of comments filed in this proceeding, but many are long and contain complex cost estimates and other detailed data. It claims that a comprehensive review and analysis of the comments will require more than the 30 days that the current August 31st deadline permits. Second, Capital Network argues that, apart from the number and length of comments, the comments range over an unusually large number of discrete, albeit related, issues, including rate regulation of OSPs. It asserts that it is likely to take parties more than 30 days to sort through the various positions of the comments and to identify areas of contradiction and concurrence.

3. We do not routinely grant extensions of time,[3] particularly in situations like this, where we have already granted one such extension. In this case, however, we are persuaded that an extension would serve the public interest in light of the large number of comments and the significant amount of data submitted in those comments. We believe, however, that, as we have already granted one such extension for reply comments, an additional 23 days would result in excessive delay, the need for which is not demonstrated in Capital Network's petition. Therefore, we grant all parties an extension of time for the filing of reply comments from August 31, 1994 to September 14, 1994.

4. Accordingly, IT IS ORDERED that the Capital Network System, Inc's Request for Extension of Time IS GRANTED to the extent provided herein, and otherwise IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief,
Common Carrier Bureau

[1] Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77, FCC 94-117 (June 6, 1994).

[2] We previously extended the reply comment deadline from July 29, 1994 to August 31, 1994 in response to a motion for extension of time. Billed Party Preference for 0+ InterLATA Calls, Order, CC Docket No. 92-77, DA 94-703 (June 24, 1994).

[3] 47 C.F.R. § 1.46(a).

[4] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 24, 1994

APPLICATION OF EX PARTE RULES TO PROCEEDING INVOLVING A "PETITION FOR REVOCATION OF LICENSES" AGAINST SCRIPPS HOWARD BROADCASTING COMPANY

Pending before the Commission is a "Petition for Revocation of Licenses" (the "Petition") filed by Media America Corporation ("MAC") against Scripps Howard Broadcasting Company ("Scripps"). MAC characterizes its Petition as a formal complaint. MAC is the licensee of Station KTVK(TV), Phoenix, Arizona.

MAC requests that the Commission institute a proceeding under Section 312 of the Communications Act, 47 U.S.C. § 312, to revoke the television licenses of Scripps for Stations WXYZ-TV (Detroit), WEWS(TV) (Cleveland), and KNXV-TV (Phoenix) for violation of the Commission's network territorial exclusivity rule, 47 C.F.R. § 73.658(b), and for anticompetitive abuse of its power as licensee of those stations. Alternatively, MAC seeks the designation for hearing of renewal applications for those stations or the institution of a Commission inquiry into Scripps' network affiliation practices pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403. Finally, MAC requests the issuance of an order to restore the *status quo ante* and continue the ABC/KTVK affiliation during the pendency of this proceeding.

To avoid any uncertainty, we are announcing that we are treating this matter as a restricted adjudicative proceeding under the Commission's *ex parte* rules. Accordingly, *ex parte* presentations made to or from decision-making personnel in connection with MAC's Petition, or any related matter, are prohibited until the Commission's final disposition of this proceeding is no longer subject to reconsideration or judicial review. *See* 47 C.F.R. § 1.1208(a).

This action is taken by Chief, Mass Media Bureau.

For further information, contact Catherine M. Withers, (202) 632-7048.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 24, 1994

Tariff Filing Packages
Available from ITS, Incorporated

Joint efforts by the Commission's commercial contractor, ITS, Inc., and the Common Carrier Bureau's Tariff Division have produced three sets of instructional materials for nondominant carriers. Effective immediately, the public may purchase the following materials from ITS, Inc.:

- DOMESTIC NONDOMINANT TARIFF PACKAGE

  for providers of interstate telecommunications services

- INTERNATIONAL NONDOMINANT TARIFF PACKAGE

  for providers of international telecommunications services

- INFORMATIONAL TARIFF PACKAGE

  for providers of interstate operator services

Each of these packages is designed to answer the majority of questions new long distance carriers often ask about the mechanics of the FCC's tariff filing process. The packages contain explicit guidelines, illustrative materials such as tariffs and applications, Part 61 of the Rules (governing tariffs), and a fee filing guide with the required fee forms.

Packages may be ordered from ITS, Inc. by calling (202) 857-3800.

For further information contact Frank Hopwood at the FCC on (202) 418-1540 or Wilbur Thomas at ITS, Inc. on (202) 857-3819.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Reconsideration

C-TEC CABLE SYSTEMS
OF MICHIGAN INC.

of Certification of
Pentwater Township, MI
to Regulate Basic Cable Service Rates

of Certification of
Littlefield Township, MI
to Regulate Basic Cable Service Rates

of Certification of
Dorr Township, MI
to Regulate Basic Cable Services Rates

MEMORANDUM OPINION AND ORDER

Adopted:August 26, 1994; Released: August 26, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed three petitions for reconsideration challenging the certifications to regulate basic cable rates of Pentwater Township, MI, Littlefield Township, MI, and Dorr Township, MI.[1] In each petition, C-TEC argued that its cable system serving the area in question is exempt from rate regulation because it is subject to effective competition. All of the franchising authorities, except Pentwater, filed an opposition to C-TEC's petition to which C-TEC has filed a reply. Subsequently, C-TEC filed a supplement to each petition. In response, all of the franchising authorities filed motions to strike C-TEC's petitions.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition.[3] Such certification becomes effective within 30 days of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification.[5] Regulation of rates is automatically stayed pending review of a petition for reconsideration alleging effective competition.[6]

3. In its petition challenging Pentwater's certification, C-TEC originally stated that its system served only 221 of the 1,437 "homes" and, therefore, its system served only 15% of the households within that franchise area.[7] In its petition against Littlefield, C-TEC initially stated that its system served only 263 of the 1,266 "homes" and, therefore, its system's served only 21% of the households within the franchise area.[8] Similarly, in its petition against Dorr, C-TEC initially claimed that it served only 462 of the 1,630 "homes" within the franchise area and, therefore, its system's penetration level was only at 28% in that franchise area.[9]

4. In its supplements, C-TEC effectively withdraws its petitions for reconsideration by acknowledging that, in light of the Commission's recent clarification of the definition of "households,"[10] its systems' penetration levels are above those needed to demonstrate effective competition. Specifically, in its supplements, it states that its penetration level is 86% in Pentwater Township,[11] 42% in Littlefield Township,[12] and 32% in Dorr Township.[13] In light of this information, we deny C-TEC's petitions.[14]

---

[1] The FCC Community ID Nos. for these franchise areas are as follows: Pentwater Township, MI -- MI0960, Littlefield Township, MI -- MI0619; and Dorr Township, MI -- MI0596.

[2] *See* 47 C.F.R. § 543(a)(4).

[3] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer rate regulations; or (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties. *See* 47 U.S.C. § 543(a)(4).

[5] *See* 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993. In each petition, the "homes" data is based on "housing unit" (occupied and vacant) data found in the 1990 Census. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CPH-1-24, 1990 Census of Housing, Summary Population and Housing Characteristics, Michigan, Table 7.

[8] Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993.

[9] Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993.

[10] *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 59 FR 17,961 (April 15, 1994) (*"Third Recon. Order"*). In the *Third Recon. Order*, the Commission clarified that the term "households" includes only full-time occupied housing units. *Id.*, at 17,962.

[11] Declaration of Robin R. Troop, Vice President and General Manager, dated May 20, 1994.

[12] Declaration of Robin R. Troop, Vice President and General Manager, dated May 20, 1994.

[13] Declaration of Robin R. Troop, Vice President and General Manager dated May 20, 1994.

[14] Littlefield and Dorr argued that C-TEC had redefined its franchise area. In light of C-TEC's acknowledgement that its systems are not subject to effective competition, we see no need to address this argument at this time.

ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by C-TEC Cable Systems of Michigan, inc. challenging the certification of Pentwater Township, Littlefield Township, and Dorr Township, MI to regulate rates ARE DENIED.

6. IT IS FURTHER ORDERED that, to the extent that C-TEC has not already done so, it shall file the required rate justifications on the applicable forms with the respective franchising authority within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the franchising authority that it is regulating C-TEC's rates, whichever is later.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

8. Interested parties may direct any questions to Lisa M. Higginbotham, Cable Services Bureau, Consumer Protection Division at (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**GEN Docket No. 90-314** **ET Docket No. 92-100**
Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services	RM-7617, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980

SECOND MEMORANDUM OPINION AND ORDER

Adopted: August 16, 1994; Released: August 25, 1994

By the Commission:

INTRODUCTION

1. By this action, we are amending the rules concerning the licensing of "response channels" in the narrowband personal communications services (PCS). Response channels are channels that are set aside to provide existing paging systems with two-way capability, including acknowledgement of a page or advanced messaging capability. Specifically, we are modifying the definition of an existing paging licensee, the requirement that an existing paging licensee operate a base station in the area for which it is applying for a response channel and the rule limiting existing paging licensees to two response channels in any given geographic area. These changes are in response to a Petition for Reconsideration of the *Memorandum Opinion and Order* in this matter that was filed by the National Association of Business and Educational Radio, Inc. (NABER).[1] We are also modifying the attribution standards with regard to narrowband PCS channels and revising the Basic Trading Area (BTA) service area definition to provide two local service areas in Puerto Rico. We believe these changes will improve the fairness of the licensing process for narrowband PCS and provide for more effective use of the narrowband PCS spectrum.

BACKGROUND

2. In the *First Report and Order*, we allocated three megahertz of spectrum at 900 MHz for the narrowband PCS service and adopted rules to govern narrowband PCS operation.[2] As part of this action, we allotted eight 12.5 kHz wide response channels exclusively for use by existing common carrier and private paging licensees. In the *Memorandum Opinion and Order*, we designated four of the eight response channels for licensing at the Major Trading Area (MTA) level and four for licensing at the BTA level.[3] We also defined an existing paging licensee as a paging licensee authorized under Part 22 or Part 90, as of June 24, 1993, the adoption date of the *First Report and Order*.[4] Additionally, we stated that to be eligible for a response channel license, an existing paging licensee must operate at least one base station in the MTA or BTA for which it requests a license. Finally, we limited each licensee to two paging response channels per geographic area.

3. On April 25, 1994, NABER submitted a Petition for Reconsideration of the *Memorandum Opinion and Order* requesting reconsideration and clarification of certain aspects of the eligibility and multiple ownership rules that apply to the response channels. Comments were filed by Paging Network, Inc. (PageNet);[5] no reply comments were filed.

DISCUSSION

Eligibility for Response Channel Licenses

4. As indicated above, we limited eligibility for acquiring narrowband PCS response channels to existing paging licensees and defined an existing paging licensee to be a paging licensee authorized under Part 22 or Part 90 of our rules as of June 24, 1993. We also required that the existing paging licensee operate at least one base station in any MTA or BTA for which it requests a response channel.

5. In its petition, NABER requests that the eligibility requirement to operate a base station in the service or trading area for which a response channel is sought be changed to a requirement that the applicant merely provide coverage within the trading area.[6] NABER argues that basing eligibility on the location of a transmitter instead of coverage area could prevent operators from obtaining response channels. It states that the coverage provided by a single base station may include more than one BTA and that thus, under the adopted rules, the operator would not be eligible for response channels in all of the BTAs in which it provides conventional one-way paging services. NABER recommends that we allow paging licensees to apply for response channels in trading areas that are within

---

[1] *See Memorandum Opinion and Order*, 9 FCC Rcd 1309 (1994). The *Memorandum Opinion and Order* was issued in response to petitions for reconsideration and clarification of the *First Report and Order*, 8 FCC Rcd 7162 (1993).

[2] *See First Report and Order, supra*. In that action, we allocated the 901-902 MHz, 930-931 MHz and 940-941 MHz bands for narrowband PCS and made two megahertz of that spectrum available for licensing.

[3] *See Memorandum Opinion and Order, supra* at ¶ 16. *See also* Rand McNally, *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39. Rand McNally organizes the 50 States and the District of Columbia into 47 MTAs and 487 BTAs. For PCS licensing purposes, we adopted service areas based on the Rand McNally MTA and BTA definitions with certain exceptions. In particular, we separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. In our rules, the insular areas are treated as five BTA service areas and three MTA service areas, *see* Section 24.102 of the Commission's Rules.

[4] *See Memorandum Opinion and Order, supra* at ¶ 26.

[5] PageNet's comments were filed 33 days late. In a petition for acceptance of late-filed comments, PageNet states that it did not focus on NABER's petition until it was reviewing the proposed auction rules for the response channels. In the interest of considering a full record in this matter, we are accepting PageNet's comments.

[6] *See* NABER Petition at pages 5 and 6.

25 miles of the geographic coordinates of any base station licensed as of May 10, 1994, the release date of the *Third Report and Order* in PP Docket No. 93-253.[7]

6. NABER also requests that we clarify whether the June 24, 1993, date for determining whether an entity is an existing paging licensee is applicable in determining the area of operation for license eligibility purposes. It notes that an existing carrier, initially licensed as of June 24, 1993, may have expanded or constructed its system into adjacent areas after June 24, 1993. NABER contends that such a carrier should be able to include its current coverage area for purposes of obtaining response channels so as to make its entire system compatible and competitive even though parts of it were constructed or put into operation after June 24, 1993.

7. PageNet, in its comments, generally supports the rule modifications suggested by NABER. In addition, PageNet requests that the rule limiting applicants to only Part 22 and Part 90 licensees as of June 24, 1993, be eliminated or modified. It argues that this restriction is not needed to prevent speculative or frivolous applications under an auction regime and that the ability to improve service should not be arbitrarily restricted to those that were licensees on a certain date. PageNet requests that the rules be modified to permit applications for response channels by any licensee operating a system serving at least some portion of the market on the date the application is filed.

8. Our decision to license the response channels on an MTA and BTA basis and to require operation of a base station transmitter in the service area was intended to facilitate our licensing process and provide a simple method for determining mutually exclusive applications. Existing paging stations are currently licensed on a mileage separation basis rather than an MTA and BTA basis. We concur with the parties that there are advantages to basing eligibility on the coverage area of existing base stations. As noted by NABER, a single base station may often cover more than one BTA. We therefore find that a coverage area standard for response channel eligibility would better conform with the service needs of existing paging operations. Accordingly, we are amending our rules to permit licensees to obtain response channels sufficient to upgrade existing paging systems over their entire coverage area.

9. We also believe that a simple "brightline" test is needed for determining the coverage area of existing paging systems in order to facilitate the licensing of response channels. In considering this issue, we note that while existing paging operations include several classes of operations with varying service radii, a 20-mile (32.2 kilometer) radius of reliable service is typical of paging operations. We therefore believe that a 20-mile service radius would better reflect the service areas of most existing paging operations than the 25-mile standard suggested by NABER. At the same time, we recognize that, as specified in our rules, some paging operations have service areas larger than 20 or 25 miles. Accordingly, we will consider the service radius of a paging transmitter to be 20 miles for purposes of determining eligibility for response channel licenses, except that for certain classes of high-powered paging stations we will use a graduated series of wider service radii specified in our paging rules.[8] This standard will establish a clear and concise test for all applicants and minimize the administrative burden on our resources. Existing paging licensees will be eligible for response channels in any BTA or MTA that encompasses an authorized base station or which is partly or wholly overlapped by the paging system's service area as defined above.

10. We also find merit in NABER's request to allow existing licensees that expand their service areas after June 24, 1993, to be eligible for response channels in the expanded service areas. This request is consistent with our decision to provide opportunities for upgrading existing paging operations. We further agree with PageNet that any licensee operating a system that serves some portion of a market should be eligible to apply for response channels in that market, regardless of whether the licensee was operating before June 24, 1993. In this regard, we see no reason why operators of existing systems that have been expanded into adjacent trading areas after June 24, 1993, should be entitled to bid for response channels in newly served areas while operators of new systems authorized after that date should be barred from bidding for those channels. We therefore conclude that, as a matter of equity, the eligibility criterion should be modified to permit any paging licensee to apply for the response channels in a market, so long as the licensee's system serves some portion of that market on the date the application is filed. In particular, we note that on October 21, 1993, we adopted amendments to our private paging rules that resulted in the issuance of substantial numbers of new licenses for conventional paging.[9] We find that licensees of both expanded systems and new systems authorized after June 24, 1993, should have an opportunity to purchase the response channels. Accordingly, we are amending the eligibility requirements for holding narrowband PCS response channels as follows. Existing paging licensees will be defined as paging licensees authorized under Part 22 or Part 90 of our Rules as of the deadline for filing applications to participate in the competitive bidding for the paging response channels.[10] This application filing deadline will be established in a public notice.

Acquisition of Multiple Response Channels

11. In the *Memorandum Opinion and Order*, we limited existing paging licensees to acquisition of two response channels in a given geographic area. Our intent in impos-

[7] This recommendation was submitted by NABER in an *ex parte* presentation to the Commission's staff on June 29, 1994.

[8] In the case of "F," "G," "H," or "K" class paging stations under both Sections 22.502(c) and 90.495(b)(1) of our rules, the service area for purposes of response channel eligibility will be defined by the service area radius specified in Section 22.504(b)(2).

[9] *See Amendment of the Commission's Rules to Provide Channel Exclusivity To Qualified Private Paging Systems At 929-930 MHz, Report and Order*, 8 FCC Rcd 8318 (1993).

[10] Mercury Communications, Inc (Mercury) filed a petition for clarification of the *Third Report and Order* in the competitive bidding proceeding (PP Docket No. 93-253) requesting that the June 24, 1993 date apply only to the initial auction and that this date not apply should response channels remain available following the initial auction. Mercury states that it is an applicant to provide private carrier paging service at numerous locations in the New York City metropolitan area, but was not authorized in that area as of June 24, 1993. Mercury argues that it would not serve the public interest to forever preclude companies not authorized as of June 24, 1993 because paging is a dynamic, evolving industry. We believe that the revised rules we are adopting herein will remedy the inequity to which Mercury refers.

ing this limit was to allow an opportunity for at least four existing paging licensees to upgrade their operations. NABER agrees that the two channel limit is useful as it relates to the initial auctioning of frequencies and that it should serve as a protective measure against the hoarding of response channels by a few carriers. NABER is concerned, however, that this rule could interfere with the orderly operation of the marketplace if maintained on a long term basis. It states that when paging licensees merge or are acquired, the response channels used with their systems should be transferred as an integral part of the new system. Such transfers would not be permitted under the current rules if the acquiring operator would end up with more than two response channels in a particular service area. NABER recommends that we modify the two channel limit to provide that, under certain conditions, existing paging licensees would not be subject to a limit on the number of response channels they could acquire at any time after the initial grants of the licenses for those channels are final.[11] Under NABER's proposal, aggregation of response channels would be limited to parties that acquire the channels as part of an existing system or to supplement their own existing system. It suggests that approval for such acquisitions be conditioned on a review by the Commission to ensure that the purpose of the rule would not be violated and that this scrutiny be relaxed after one year.

12. Our purpose in adopting the two-channel limit was to ensure that at least four existing paging licensees will have the opportunity to upgrade their one-way services. We now believe that once the existing paging licensees have had an opportunity to obtain response channels and the competitive structure of narrowband PCS markets have taken form, it will not be necessary to limit the number of response channels a paging licensee may hold.[12] We agree with NABER that in cases where paging systems are merged or acquired, the seller should be permitted to transfer the response channels as well. At that point, the response channels would be integral to the individual systems that are merged, and we see no reason to require that they be divested. We also agree with NABER that eliminating the rule immediately after the initial licensing auction could encourage frivolous bidding in the auction process. We therefore find that NABER's initial suggestion for providing a sunset period is reasonable, and believe that a period of two years will be sufficient to discourage such speculation. Accordingly, we are amending the rules to provide that the two response channel per market limit will expire two years after the date of initial license grant. We believe that this sunset provision addresses NABER's concerns and that additional scrutiny by the Commission of response channel acquisitions would impose an unnecessary administrative burden.

Ownership Attribution

13. The narrowband PCS rules provide that licensees shall not have an ownership interest in more than three narrowband PCS channels in any geographic area. The rules further provide that, for the purpose of this restriction, a licensee is any person or entity with an ownership interest of five or more percent in an entity holding a narrowband PCS license.[13] On our own motion, we reconsider this attribution requirement as it applies to indirect ownership of narrowband PCS licenses. In cases where a party has indirect ownership, through an interest in an intervening corporation or partnership that has less than a controlling ownership in a narrowband PCS license, we consider whether to apply a "multiplier" to determine the effective ownership interest of that party. A multiplier is currently used in our attribution rules for broadcast licenses,[14] and has recently been adopted for broadband PCS licenses,[15] by multiplying together each non-majority, non-controlling interest in a license to determine the effective ownership interest of a party whose interest is held through intervening entities. For example, if Party X owns a 25 percent non-controlling interest in Corporation Y that holds a 10 percent non-controlling interest in Licensee Z, Party X would be deemed to have a 2.5 percent effective ownership interest in Licensee Z. Use of a multiplier allows the Commission to accurately take account of a party's "actual involvement with the ultimate licensee" as well as the party's ability to exert control over that licensee.[16]

14. In the *Memorandum Opinion and Order*, we adopted a flat five percent attribution rule for any party that has any ownership interest in an entity holding a narrowband PCS license to ensure that no person or entity is able to exert undue market power through partial ownership in multiple narrowband PCS licensees in a single service area. We did not specify that both direct and indirect interests in

---

[11] This description of NABER's recommendation includes clarifications that were submitted in its *ex parte* presentation to the Commission's staff on June 29, 1994. NABER had initially suggested that this problem be resolved by providing for waivers of the rule or by establishing a sunset date after which the rule would be automatically eliminated.

[12] We do not believe that it is necessary to maintain the two channel limit in order to ensure a competitive market for narrowband PCS services in the long run. In this regard we note that our rules provide for twenty-one 50 kHz based narrowband PCS licenses with associated response channels at any geographic point. Nine of these response channels are 50 kHz (five nationwide, two regional, and two MTA channels) and twelve are 12.5 kHz (three nationwide, four regional, three MTA, and two BTA channels). Thus, existing paging licensees that operate narrowband PCS services using response channels will compete with other narrowband PCS licensees in each area.

[13] *See* Section 24.101 of the Commission's Rules and *Memorandum Opinion and Order, supra* at ¶ 25. As we have stated in addressing interests acquired at auction, where common non-controlling ownership exists between two or more bidders and such bidders cumulatively obtain more licenses than permitted, we permit divestiture of non-controlling interests to bring the entities into compliance if completed within 90 days of license grant. *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, PP Docket No. 93-253, GEN Docket No. 90-314, and ET Docket No. 92-100, FCC 94-219 at ¶ 29 (adopted August 16, 1994). Further, both investors and corporate licensees have a continuing obligation to be vigilant in monitoring relevant holdings to ensure compliance. *See Memorandum Opinion and Order*, File No. BTCCT-920514KE, 7 FCC Rcd 6058 at 6067 (1992); *Attribution of Ownership Interests*, 97 FCC 2d at 1033, ¶ 77.

[14] *See* 47 C.F.R. § 73.3555, n.2 (d).

[15] *See Further Order on Reconsideration* (*Further Order*), GEN Docket No. 90-314, 59 FR 39704 (August 4, 1994).

[16] *See Further Order; see also Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 FCC 2d 997, 1018 (1984), *recon.*, 58 RR 2d 604 (1985), *further recon.*, 1 FCC Rcd 802 (1986).

a narrowband PCS licensee were attributable. *Compare* Section 24.204(a), (d)(2)(viii) of the Commission's Rules. On reconsideration, we conclude that consideration of indirect ownership interests, through the use of a multiplier in future application proceedings,[17] will better facilitate a competitive narrowband PCS market. Under our prior rule, a party that has an ownership interest in a company that has a non-controlling ownership interest in a narrowband PCS licensee would be permitted to acquire an attributable ownership interest in three additional narrowband PCS licensees in the same area. For example, if Party A has a 40 percent non-controlling ownership interest in Company B, which in turn has a 40 percent non-controlling ownership interest in Narrowband PCS Licensee C, Party A (having only an indirect interest in Licensee C) would, under this rule, be permitted to acquire an attributable ownership interest in Narrowband PCS Licensees D, E, and F in the same area. By contrast, when considering its indirect ownership interest under the multiplier approach, Party A would be deemed to have a 16 percent effective ownership interest in Narrowband PCS Licensee C, well in excess of our five percent limitation, and would therefore be permitted to have an attributable ownership interest in only two additional narrowband PCS licensees in the same area.

15. We also find that using a multiplier to calculate the effective indirect ownership interest will better promote a competitive narrowband PCS market than attributing to a party in full the ownership interest of an intervening company in a narrowband PCS licensee. This approach would likely exclude parties that pose no threat to competition and prevent a party that has neither the ability to exert control nor a substantial financial stake in a narrowband PCS licensee from acquiring an attributable ownership interest in more than two additional narrowband PCS licensees in the same area. In the example in paragraph 13, *supra*, Corporation Y's 10 percent non-controlling interest in Licensee Z would be deemed in excess of the five percent threshold applicable to narrowband PCS ownership. Thus, Party X, which has a 25 percent non-controlling interest in Corporation Y, would be restricted to acquiring an attributable ownership interest in only two additional narrowband PCS licensees in the same area despite its inability to exert control or significant influence over the operations of Licensee Z. By contrast, use of a multiplier produces an effective ownership interest of only 2.5 percent by Party X in Licensee Z, permitting Party X to acquire an attributable ownership interest in three additional narrowband PCS licensees in the same area.

16. Considerations of true economic interest in, and ability to control, a licensee are crucial in determining whether a particular indirect ownership interest could affect the degree of competition in a market and therefore should be attributed to the holder for purposes of our multiple ownership rules. These considerations apply equally in the broadband and narrowband PCS contexts. Accordingly, a multiplier similar to that used in applying our attribution rules in broadband PCS will be used to determine effective ownership interests in narrowband PCS licensing. We therefore will amend Section 24.101 of our rules to include the use of a multiplier to determine whether an entity holding an indirect non-controlling interest in a narrowband PCS licensee has an attributable interest for the purpose of our multiple ownership rules. As in our broadcast and broadband PCS rules, where an entity's ownership interest in any link in the ownership chain is greater than 50 percent or is controlling, the interest will be treated as if it were 100 percent for the purposes of applying the multiplier.

Local Service Areas in Puerto Rico

17. In response to a suggestion by Pegasus Communications, Inc. (Pegasus) in the recent broadband PCS proceeding, we are revisiting the local service area adopted for the Commonwealth of Puerto Rico.[18] We currently treat Puerto Rico as a BTA for narrowband PCS licensing purposes.[19] In the broadband PCS proceeding, Pegasus requested that we divide the Puerto Rico service area into two local service areas and suggested that we likewise establish two BTA-like service areas in Puerto Rico for the narrowband PCS service. Pegasus argued that due to the size and mountainous terrain of the island, Puerto Rico essentially is split in half, comprising two commercial centers: San Juan and Mayaguez-Ponce. Pegasus stated that these mountains make travel to San Juan difficult for Puerto Ricans located in the southern and western portions of the island, and therefore they must conduct essentially all commerce in the port cities of Mayaguez, Aguadilla, or Ponce. Pegasus also stated that the population of its proposed Mayaguez/Aguadilla-Ponce service area is more than one million and this area would be larger in population than several of the existing BTAs. Pegasus provided a list of municipios that it suggests constitute the Mayaguez/Aguadilla-Ponce service area and suggested that the San Juan service area consist of all municipios not listed for the Mayaguez/Aguadilla-Ponce BTA-like service area.[20] No party responded to this petition. In our *Memorandum Opinion and Order* on broadband PCS, we adopted Pegasus's suggestion and provided two separate service areas in Puerto Rico, one for Mayaguez/Aguadilla-Ponce and one for San Juan.[21] This change recognized the difficulties created by the mountain range separating these two areas. We also stated that no parties opposed this request[22] and that we found this adjustment to be in the public interest.

---

[17] The multiplier rule will not be applied to Mobile Telecommunication Technologies Corporation's pioneer's preference license for a nationwide channel, or to the other ten nationwide channels that already have been auctioned. We do not believe that it would be equitable to apply this new rule retroactively.

[18] *See* Pegasus Petition for Reconsideration of the *Second Report and Order*, GEN Docket No. 90-314 (filed December 8, 1993); Pegasus *ex parte* presentation, GEN Docket No. 90-314 (filed April 4, 1994).

[19] *See* Section 24.13(b)(2) of the Commission's Rules.

[20] The primary political divisions of Puerto Rico are termed "municipios." *See 1990 Census of Population and Housing, Summary Population and Housing Characteristics, Puerto Rico,* 1990 CPH-1-53, Issued November 1991 by the Bureau of the Census, at page A-5. In its petition, Pegasus translates "municipios" to be "counties." We use the term "municipios" to avoid confusion.

[21] *See Memorandum Opinion and Order*, GEN Docket No. 90-314, 59 FR 32820 at ¶ 58 (June 24, 1994), *petitions for recon. pending.*

[22] We note, however, that Puerto Rico Telephone Company has filed a petition for reconsideration of the broadband PCS *Memorandum Opinion and Order*, in which it requests that we reconsider our decision to divide Puerto Rico into two BTAs.

18. We agree with Pegasus that it is desirable to modify the Puerto Rico narrowband PCS service area to specify two BTA-like service areas in the same manner as our action in the broadband PCS proceeding. The 1990 census for Puerto Rico is 3,522,037.[23] The population of the new Mayaguez Aguadilla-Ponce service area is 1,048,473 and the population of the new San Juan service area is 2,473,564. Only 49 of the remaining 491 BTAs have a population of greater than 1,048,473 and only 18 BTAs have a population greater than 2,473,564.[24] We find that the population of each of these service areas is sufficient to support advanced narrowband PCS services.[25] Additionally, we conclude that the patterns of local trade caused by the mountainous terrain of the island make the proposed division economically and geographically desirable. Accordingly, we are providing two BTA-like service areas in Puerto Rico for narrowband PCS service. This modification will apply to all BTA channels in the narrowband PCS service, *i.e.*, both the eight paging response channels and the two 50 kHz paired with 12.5 kHz channels.[26]

ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register.

20. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by the Association of Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. IS GRANTED to the extent discussed above. IT IS FURTHER ORDERED THAT the Petition for Acceptance of Late-filed Comments by Paging Network, Inc. IS GRANTED.

21. *Final Regulatory Flexibility Analysis.* Pursuant to 5 U.S.C. Section 603, an initial Regulatory Analysis was incorporated in the *Notice of Proposed Rule Making and Tentative Decision* in GEN Docket No. 90-314 and ET Docket No. 92-100. Written comments to the proposals in the *Notice*, including the Regulatory Flexibility Analysis, was requested. A Final Regulatory Flexibility Analysis was incorporated in the *First Report and Order* in this proceeding.

A. *Need for and Objective of Rules:* Our objective is provide an allocation for PCS services that require narrower bandwidth blocks than the requests for wider bandwidth blocks at 2 GHz. We believe that the flexibility of the rules will enable a diversity of services, including enhanced paging and messaging services.

B. *Issues Raised by the Public in Response to the Initial Analysis:* No party suggested modifications specifically to either the initial or final regulatory flexibility analyses.

C. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives:* We have reduced burdens wherever possible. The regulatory burdens that we have retained are necessary to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. In the Competitive Bidding proceeding, PP Docket No. 93-253, we have provided bidding credits and installment payments for entrepreneurial and small businesses and companies owned by woman and minorities in order to ensure that they can participate in the provision of narrowband PCS services. The Secretary will send a copy of the action to the Chief Counsel for Advocacy of the Small Business Administration.

22. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Final Rules

Part 24 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 24 -- PERSONAL COMMUNICATIONS SERVICES

1. The authority citation in Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. Section 24.101 is amended to read as follows:

§ 24.101 Multiple ownership restrictions.

(a) Narrowband PCS licensees shall not have an ownership interest in more than three of the 26 channels listed in Section 24.129 in any geographic area. For the purpose of this restriction, a narrowband PCS licensee is any person or entity with an ownership interest of five or more percent in a narrowband PCS license.

(b) In cases where a party applies for a license after August 16, 1994 or has a license transferred to it after that date, and the party has indirect ownership, through an interest in an intervening entity (or entities) that has ownership in the narrowband PCS license, that indirect ownership shall be attributable if the percentages of ownership at each level, multiplied together, equal five or more percent

---

[23] *See supra* note 20 at page 1.

[24] *See* Rand McNally *1992 Commercial Atlas & Marketing Guide*, "Population, Income and Sales Data for the 150 Largest Basic Trading Areas," at page 44, Census 4/1/90 column.

[25] We note that Puerto Rico is licensed as five Metropolitan Statistical Areas (MSAs) and seven Rural Service Areas (RSAs) in the Domestic Public Cellular Radio Telecommunications Service.

[26] A map showing the new narrowband PCS service areas in Puerto Rico is provided in Appendix B. *See* Sections 24.129(d) and 24.130(c) of the Commission's Rules for a listing of the BTA channels.

ownership of the narrowband PCS license, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

EXAMPLE: Party X has a non-controlling ownership interest of 25 percent in Company Y, which in turn has a non-controlling ownership interest of 10 percent in Company Z, the narrowband PCS licensee. Party X's effective ownership interest in Company Z is Party X's ownership interest in Company Y (25 percent) times Company Y's ownership interest in Company Z (10 percent). Therefore, Party X's effective ownership interest in Company Z is 2.5 percent, and is not attributable.

3. Section 24.102 is amended by revising paragraph (d) to read as follows:

§ 24.102 Service areas.

* * * * *

(d) The BTA service areas are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Gunica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Dlaz, Lajas, Las Marlas, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponceâ, Quebradillas, Rinc , Sabana Grande, Salinas, San Germn, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

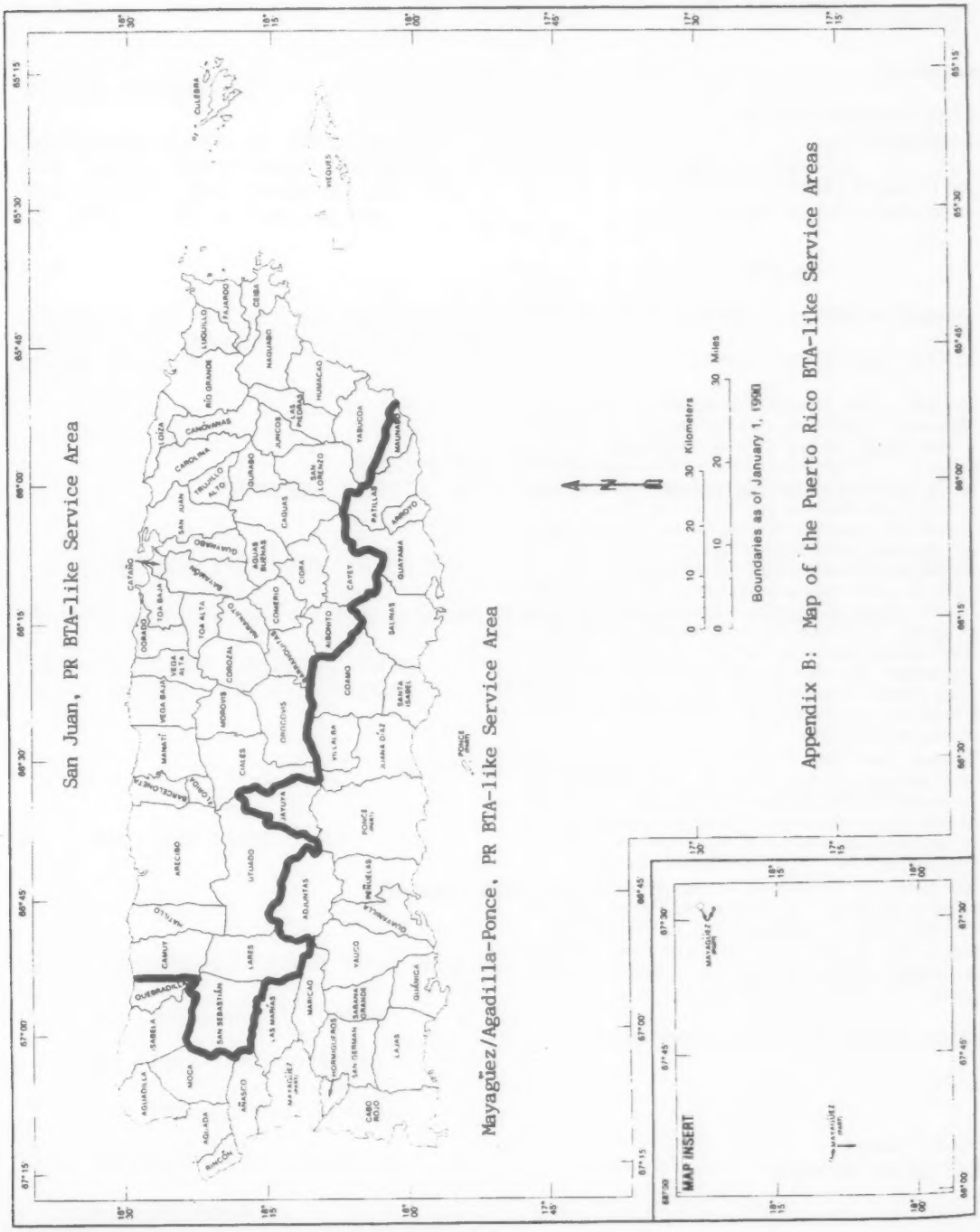
4. Paragraph (a) of Section 24.130 is revised to read as follows:

§ 24.130 Paging response channels.

(a) The channels listed in paragraphs (b) and (c) of this section are available to licensees of conventional one-way paging base stations licensed pursuant to Part 22 or Part 90 of this chapter as of the application filing deadline for the paging response channels. Eligibility for response channels shall be based on the authorized service area of each existing paging licensee. This service area is defined as the area within a 32.2 kilometer radius of the licensee's base stations or, in the case of "F," "G," "H," or "K" class stations under Sections 22.502(c) and 90.495(b)(1) of this chapter, as the area that is within the service area radius specified in Section 22.504(b)(2) of this chapter. Existing paging licensees are eligible to bid for any response channel in any BTA or MTA which encompasses an authorized base station or which is partly or wholly overlapped by a licensee's service area. These channels shall be used only in paired communications with existing paging channels to provide mobile-to-base station communications. Until two years after the date of initial license grant, eligible paging licensees are limited to a maximum of two response channels within the same geographic area. Licenses for paging response channels are not counted toward the multiple ownership restrictions of Section 24.101.

* * * * *

Municipos



U.S. DEPARTMENT OF COMMERCE Economics and Statistics Administration Bureau of the Census

G-2 PUERTO RICO

MAPS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMCAST CABLEVISION OF
TALLAHASSEE, INC.

Request for Stay of a Local Order of the
City of Tallahassee Pending Appeal

ORDER

Adopted: August 26, 1994; Released: August 29, 1994

By the Chief, Cable Services Bureau:

1. On April 8, 1994, Comcast Cablevision of Tallahassee, Inc. ("Comcast"), filed with the Commission an Appeal from a Rate Order of the City of Tallahassee, Florida ("Tallahassee" or "City"). On May 19, 1994, we issued a letter ruling approving an agreement between Comcast and the City which specified that the City would vote to reconsider its local rate order and that neither party would claim that such reconsideration violated federal or local law.[1] In addition, the agreement provided for any refunds required by any new or revised rate order to extend back to September 1, 1993, should the period for reconsideration and implementation of the new rate order extend past September 1, 1994. In addition to signifying the Bureau's approval of the agreement, the letter ruling required the parties to inform the Bureau in the event the City voted to reconsider the local rate order so that we could dismiss *sua sponte* the cable operator's appeal.[2]

2. By letter dated July 14, 1994, and pursuant to the agreement between Comcast and the City, counsel for Comcast advised the Commission that the City had revised its local rate order a day earlier. Comcast requested that its pending appeal be dismissed without prejudice to file an appeal of the City's July 13, 1994, amended resolution.

3. Accordingly, IT IS ORDERED, that the Appeal from a Rate Order of the City of Tallahassee, Florida, filed by Comcast Cablevision of Tallahassee, Inc., is DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

---

[1] *See* Letter from Kathleen M.H. Wallman, Acting Chief, Cable Services Bureau, to Mr. Joseph Van Eaton, Esq., May 19, 1994 ("Letter Ruling").
[2] *Id.* at 3.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-39

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 93-215
Protection and Competition Act	)	
of 1992: Rate Regulation	)	
	)	
and	)	
	)	
Adoption of a Uniform Accounting	)	CS Docket No. 94-28
System for Provision of Regulated	)	
Cable Service	)	

REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 22, 1994 Released: March 30, 1994

By the Commission: Commissioner Barrett issuing a statement.

Comment Date: **July 1, 1994**
Reply Comment Date: **August 1, 1994**

Table of Contents

Paragraphs:

I. Introduction 1

Report and Order

II. Cost-Based Cable Rate Regulation 10

A. Regulatory Goals

B. Regulatory Model

C. Procedural Issues

III. Required Cost Showing 37

A. Ratebase

1. Used and Useful, Prudent Investment Standards

2. Valuation of Plant in Service

3. Additions to Ratebase

a. Accumulated Start-up Losses

b. Excess Acquisition Costs and Intangibles

4. Plant Under Construction

5. Cash Working Capital

6. Other Costs - Excess Capacity, Cost Overruns, and Premature Abandonment

B. Expenses 120

1. Operating Expenses

2. Depreciation

3. Taxes

C. Test Year Methodology 142

IV. Rate of Return 147

A. Uniform Rate of Return

B. General Methodology

C. Cost of Equity

D. Debt

E. Capital Structure

F. Overall Cost of Capital

V. Accounting Requirements 209

VI. Cost Allocation Requirements 226

VII. Accounting and Cost Allocation Requirements for External Costs 242

VIII. Affiliate Transactions 249

IX. Streamlined Filing and Review 272

A. Small Systems

B. Network Upgrades

X. Hardship Rate Relief for Operators 292

XI. Upgrade Incentive Plan 295

Further Notice of Proposed Rulemaking

XII. Cost-based Cable Rate Regulation 305

A. Cost-of-Service Requirements

B. Cable Accounting System

C. Affiliate Transactions

D. Productivity Offset

E. Upgrade Incentive Plan

F. Average Cost Schedules

XIII. Initiation of Cost Studies 334

Conclusion

XIV. Regulatory Flexibility 335

XV. Paperwork Reduction 353

XVI. Procedural Provisions 354

XVII. Ordering Clauses 356

Attachments

Attachment A - Parties

Attachment B - Rules

Attachment C - Proposed Accounting Rules

Attachment D - Cost of Equity Studies

I. Introduction

1. The Cable Act of 1992 was adopted by Congress based on findings that most cable television systems do not face effective competition within their geographic areas and that, in the absence of regulation, cable operators have undue market power.[1] The Act sets out specific policy objectives for this Commission, including promotion of a diversity of views and information, reliance on marketplace forces, encouraging expansion of cable system capacity and programming where economically justified, and protection of customer interests where cable systems are not subject to effective competition.[2]

2. Rate regulation under the Cable Act of 1992 applies only to cable systems not subject to effective competition. For these systems, the Act directs the Commission to prescribe regulations for ensuring that cable rates are reasonable, taking into account criteria such as the rates for cable systems subject to effective competition, system capital and operating costs, and advertising revenues.[3] Rate regulation authority is divided between the FCC and local franchising authorities: certified franchising authorities have primary authority to regulate rates for the basic cable service tier, and the FCC has authority, pursuant to a validly-filed complaint, to regulate other tiers of cable programming service.[4] Per-channel, per-program, and certain other offerings are generally not subject to rate regulation.[5]

3. The Commission began its implementation of the 1992 Cable Act with an initial Notice of Proposed Rulemaking, and established initial rules to implement the Cable Act of 1992 in

---

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 2, 3, 9, 14, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, § 2(b).

[3] Cable Act of 1992, § 3, Communications Act of 1934, as amended, § 623(b), 47 U.S.C. § 543(b). The statutory language differs somewhat for the basic service tier and other regulated cable programming services. Compare Sections 623(b) and 623(c) of the Communications Act.

[4] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[5] Communications Act, § 623(b)(1), 47 U.S.C. § 543(b)(1).

the Rate Order.[6] The Commission adopted a benchmark and price cap approach to serve as the primary regulatory mechanism for setting initial regulated rates and for governing rates on a going forward basis. The Commission also concluded in the Rate Order that the benchmark/price cap framework might not produce fully compensatory rates in all cases, and accordingly decided to permit cable systems to establish rates based on costs pursuant to individual cost-of-service showings.[7] The cost-of-service approach was to serve as a backup to the benchmark/price cap mechanism which a cable operator could invoke if it believed that the maximum rate under the benchmark/price cap formula would not enable the operator to recover costs that it reasonably incurred in the provision of regulated cable services.

4. In the Rate Order we discussed the relevant statutory provisions and legislative history, and concluded that the use of the benchmark/price cap approach as the primary regulatory mechanism, and the use of a cost-of-service safety valve as a supplemental mechanism, for regulating cable services is fully consistent with the applicable statutory requirements.[8] We found, however, that the record in Docket 92-266 did not provide sufficient information to enable us to develop detailed cost-of-service rules for the cable industry. We accordingly indicated that general cost-of-service principles would apply for cost-of-service showings for the time being, and we initiated this separate proceeding by issuing a Notice of Proposed Rulemaking that invited comment on the adoption of cost-of-service goals and rules, and on the role that a cost-based approach to ratemaking should play in our regulation of cable service rates.[9]

---

[6] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, Notice of Proposed Rulemaking, 8 FCC Rcd 510 (1992) (NPRM); Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (Rate Order); Second Further Notice of Proposed Rulemaking, 8 FCC Rcd 5585 (1993) (Second Notice); First Reconsideration Order, Second Report and Order, and Third Further Notice of Proposed Rulemaking, 9 FCC Rcd 1164 (1993) (First Rates Reconsideration); Third Report and Order, 8 FCC Rcd 8444 (1993).

[7] Id. at 5794, ¶¶ 262-64. See also 47 C.F.R. § 76.922 (b)(1).

[8] Rate Order, 8 FCC Rcd at 5794, ¶¶ 262-64.

[9] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 93-215, Notice of Proposed Rulemaking, FCC 93-353, released July

5. We adopt today both a Report and Order and a Further Notice of Proposed Rulemaking. In the Report and Order, we establish rules implementing a cost-of-service alternative to our primary benchmark and price cap approach to setting regulated cable service rates.[10] We set forth regulatory requirements to govern cost-of-service showings to justify rates above levels determined under our benchmarks and price cap requirements. We adopt these regulatory requirements on an interim basis, pending completion of cost studies of the cable industry. These interim rules, which apply only in cases where the cable operator elects to rely on a cost-of-service showing rather than on benchmark/price cap requirements, will apply to rates charged or to be charged after the effective date of these rules; as we indicated in the Rate Order, general cost-of-service principles will govern rates in effect prior to the effective date of these rules. Thus, to the extent that a franchising authority's examination of basic rates relates to both periods, it would apply the appropriate rules to each period. The Commission will take a similar approach to resolve cable programming complaints that cover both periods.[11]

6. We adopt today accounting and allocation requirements that will govern cost-of-service showings. In the Report and Order we also adopt procedures for emergency rate review based on a showing of special circumstances, and we adopt an Upgrade

---

16, 1993 (Notice). We also sought comment on setting a productivity offset that would reduce allowable rates under the benchmark/price cap mechanism, and we undertook cost studies of individual cable companies.

[10] In a separate decision, the Commission is adopting significant modifications to the benchmark and price cap approach to setting regulated cable service rates. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, FCC 94-38 (Benchmark Order). That decision does not alter our determination in the Rate Order to afford cable operators an opportunity to set rates based on costs.

[11] Subsequent cable programming service complaint proceedings or basic tier proceedings relating to rates while these interim rules remain effective will be determined in accordance with these rules if the cable operator elects to justify rates as cost-based. If the permanent rules differ from the interim rules, the permanent rules will apply to proceedings relating to rates after their effective date.

Incentive Plan on an experimental basis. Under this Upgrade Incentive Plan, operators will be given pricing flexibility and profit incentives to introduce new services and operate efficiently, while customers will benefit from greater assurance of reasonable, stable rates for existing services.

7. In the Further Notice of Proposed Rulemaking, we propose that these interim requirements become permanent; we propose a productivity factor that could be incorporated into the price cap mechanism governing cable service rates; and we solicit comment on a permanent upgrade incentive plan for regulated cable service. We also announce initiation of cable industry cost studies that will be used to develop average cost schedules for regulated cable services and equipment, and to evaluate whether we should require full competitive rate reductions for systems currently eligible for transition relief.[12] We solicit comment on rate of return prescription methodologies, and on proposed rules for an accounting system and for affiliate transactions.

8. The rate set in a cost-of-service proceeding will be the permitted rate, even if it is lower than the rate that would have been determined under the benchmark/price cap approach. Our requirements seek to assure that, in any individual case, rates based on costs will be reasonable for both operators and subscribers. Once a rate is established through a cost-of-service proceeding, the price cap mechanism will govern.[13] Although the rules we are adopting here do not foreclose a cable operator's presenting new cost-of-service data to justify a rate that exceeds the capped rate after a two-year period, multiple cost-of-service showings should be rare.

9. We have been mindful of the Congressional concern that we not replicate Title II common carrier regulation in regulating rates for cable operators. The primary benchmark/price cap approach does not impose the tariff filing, accounting, and cost support obligations accompanying the Title II regulation this Commission has applied to telephone companies. We also are permitting abbreviated cost showings for rate increases needed to support capital improvements such as network upgrades and

---

[12] See Benchmark Order at II.B.4.b. The Benchmark Order provides for the reduction of rates, in most cases, by an amount defined by the competitive differential. Transition relief is allowed to systems owned by "small operators" and to systems charging low prices, pending completion of our study of the prices and costs experienced by these systems.

[13] See Benchmark Order at II.B.6.; see also parts II.C.2, XII.D., infra.

rebuilds.

II. Cost-Based Cable Rate Regulation

A. Regulatory Goals

i. Notice

10. In the Notice, the Commission sought comment on what regulatory goals should guide our development of cost-based rates for regulated cable service.[14] We reiterated our belief that the benchmark/price cap approach is the primary tool for regulating cable rates, and that cost of service should serve as a 'backstop' method of rate regulation to meet the needs of cable operators with unusually high costs. We stated that our regulatory requirements for determining cost-based rates should fairly balance the interests of cable operators and consumers, permitting cable operators to recover the reasonable costs of providing cable service and attracting capital, including the opportunity for reasonable earnings, while protecting consumers from paying inappropriate costs and unreasonable charges, and should produce rates that are fair and reasonable to both.[15]

11. We tentatively concluded in the Notice that our cost-of-service regulations should offer cable operators an opportunity to recover their legitimate costs of providing service in high cost areas.[16] We stated that we would endeavor to fashion requirements that give ratemaking recognition to all legitimate costs while preventing recovery in rates of costs that subscribers should not be required to pay. We sought comment on, and stated that we would consider, the present economic and financial performance and practices of the cable industry, to allow us to assess the financial and economic impact of our cost rules on the cable industry.

12. In the Notice, the Commission observed that the benchmark approach was designed to produce rates at or near competitive levels; we solicited comment on whether cost requirements should also be designed to serve that goal.[17] We also stated in the Notice that cost requirements should be based as much as possible on a pragmatic approach geared to a practical

---

[14] Notice at ¶ 7.

[15] Id. at ¶ 8.

[16] Id. at ¶¶ 13-14.

[17] Id. at ¶ 10.

implementation by local authorities and the Commission, and that they should, to the extent possible, reduce administrative burdens on cable operators and regulators.[18]

13. Finally, we tentatively concluded in the Notice that our cost requirements should be tier neutral, in consonance with the finding in the Rate Order that a regulatory approach that produced a low-priced basic service but created incentives for cable operators to move programming to higher tiers was not desirable, and presented no advantages over an approach that was tier-neutral.[19]

ii. Comments

14. Most commenters agree with the Commission that cost-of-service regulation should serve as a backstop to the benchmark/price cap standard.[20]

15. Cable operators generally argue that the cost-of-service framework should not be guided by the goal of producing rates that approximate competitive levels, given that the cable industry has not been rate regulated since 1986 and that many operators have incurred costs that would not be recoverable under our proposed interim cost standards.[21] Michigan Committee and Municipals support the goal of approximating competitive rates,[22] but Connecticut does not believe it is possible to set "a priori rate levels" in a cost-of-service proceeding.[23]

---

[18] Id. at ¶ 12. This regulatory objective was mandated by the Cable Act of 1992, Communications Act, § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

[19] Id. at ¶ 11, citing Rate Order, 8 FCC Rcd at ¶ 195-197.

[20] See, e.g., Time Warner Comments at 2-4; California Cable Comments at 21-26. A list of commenters in this proceeding, including full names and the shortened names used herein, is provided at Attachment A.

[21] See, e.g., TMC Comments at 6-7; Comcast Comments at 15-17. See also BC Comments at 5 (this approach is result-driven and would be inherently circular). Other operators argue that such an approach would be unconstitutional. Continental Comments at 5; Viacom Comments at 7; TCI Comments at 14-15.

[22] Michigan Committee Comments at 3; Municipals Comments at 7-8.

[23] Connecticut Comments at 1.

16. Finally, cable operators generally oppose tier neutrality as a regulatory goal because they believe inter-tier inefficiencies would be created by the varying costs of programming.[24] Local authorities generally support the concept of tier-neutral regulation in the cost-of-service formulation because they believe it will prevent channel shifting from basic to higher tiers.[25]

iii. Discussion

17. Our cost-of-service requirements are designed to assure that operators are able to recover the costs of providing regulated cable service by giving ratemaking recognition to all reasonable costs while preventing recovery in rates of unreasonable costs. Thus they achieve the goal of assuring that cable operators can recover their reasonable costs of providing service in high cost areas; our cost-of-service regulations provide for streamlined cost showings, opportunities to challenge presumptive disallowances, and special procedures for operators facing financial hardship.

18. Our cost-of-service requirements are also designed to produce rates that approach as closely as possible those that would evolve in a competitive market, while still allowing the operator of a high-cost system adequate recovery. Rates set under the benchmark approach are designed to produce competitive rates based on an evaluation of the observed rates of systems subject, and not subject, to effective competition. Our cost-of-service requirements seek to exclude from rates any costs that exceed what would have been incurred in a competitive environment or that are not related to regulated services. Our analysis of allowable costs, together with options for operators to challenge presumptive disallowances, will allow into regulated rates all reasonable costs, and will disallow costs that would not be reflected in rates in a competitive market. Thus, the benchmark and cost approaches both seek to achieve competitive rates by different approaches -- one based on observed prices of cable systems, one based on actual costs.

---

[24] Continental Comments at 79; COA Comments at 88 (noting that many costs are not tier-neutral, so that per-channel cost allocations would be skewed and would fail to reflect cost causation). But see Viacom Comments at 51 n.49 (setting cable rates on a tier-neutral basis alleviates concerns over possible cross-subsidization across regulated tiers).

[25] See, e.g., Municipals Comments at 8; Michigan Committee Comments at 3.

19. Our regulatory framework gorverning cost-based rates for cable service is designed to assure that we can carefully guage the impact of the application of our cost requirements in individual cases. Our cost requirements are presumptive, and operators can present evidence seeking to justify higher rates than would otherwise be permitted under our cost rules. We also provide for hardship showings. Thus, we can assure that application of our cost rules will not adversely impact the cable industry. Further, our cost and rate of return studies will help us determine whether we should modify our general rules to avoid any undue impact on the industry. Thus, as stated, the cost-of-service option provides a safeguard for the industry from possible adverse effects in individual cases of the primary, benchmark/price cap approach.

20. We adopt our goal of creating a pragmatic cost-of-service system geared to implementation by local authorities, this Commission, and cable operators. We have streamlined and simplified our cost requirements to the extent possible, including adopting a uniform reporting form and a streamlined form for small systems, and proposing a uniform accounting system for cost-based regulated cable service. We have also provided for streamlined filing and review for rate changes due to network upgrades. These actions serve our goal of reducing administrative burdens on cable operators and regulators.

21. We adopt the goal of encouraging infrastructure investment and development. The cost-of-service principles and requirements we adopt here should allow and encourage cable operators to invest in technology, achieve efficiencies, broaden their service offerings, and extend penetration. Further, we are adopting an Upgrade Incentive Plan on an experimental basis to encourage development and deployment of new technologies and new services. Finally, we adopt our tentative conclusion that tier neutrality should be maintained. Thus, we adopt the same cost-of-service requirements for both the basic and cable programming services tiers.

B. Regulatory Model

i. Notice

22. We sought comment in the Notice on what general standard should be used to set rates based on costs for regulated cable service; we proposed using traditional cost-of-service principles to determine cost-based rates for regulated cable service.[26] We noted that under traditional cost-of-service

---

[26] Notice at ¶ 16.

regulation, rates are set at a level to provide the company with a recovery of its expenses and a reasonable opportunity to earn a fair return on its invested capital.[27] At the same time, recognizing some differences between the cable industry and other rate-regulated industries, we sought comment on alternatives or modifications to cost-of-service regulation that might be appropriate for determination of cost-based rates for regulated cable service. We also sought comment on what transition elements, if any, we should establish to permit cable operators to adapt to a rate-regulated environment.[28]

ii. Comments

23. Commenters other than cable operators generally agree that the traditional cost-of-service model we proposed is appropriate. Utah and CFA explicitly support the Commission's proposal.[29] Bell Atlantic also supports traditional ratebase/rate of return regulation because it believes this approach places cable operators on comparable regulatory footing with the local exchange companies while utilizing the Commission's expertise.[30] Georgia Cable disagrees, stating that the cable industry should not be subject to telco-like regulation merely for the sake of "regulatory parity."[31] Several parties argue that the proposed ratebase/rate of return formula contravenes the

---

[27] See id. at n.18. Under the traditional cost-of-service formulation, the company's revenue requirement is equal to the reasonable expenses of providing service and a fair return on investment. Under the traditional formulation, $R = E + (V-d)r$, where R is the revenue requirement; E is expenses including operating expenses, maintenance expenses, depreciation and taxes; V is the value of the ratebase including plant in service and working capital; d is accumulated depreciation; and r is the rate of return, consisting of a weighted average of long term debt, preferred stock, and common stock.

[28] Id. at ¶ 22.

[29] Utah Comments at 8; CFA Comments at 3.

[30] Bell Atlantic Comments at 5-6.

[31] Comments of Georgia Cable at 2-6. See also Comcast Comments at 7-8 (traditional ratebase/rate of return approach would not fairly balance the interests of consumers and cable operators); Time Warner Comments at 8 (ratebase/rate of return regulation should be one of several options available to cable operators who choose cost of service).

Congressional directive to avoid replicating Title II regulation.[32] GTE contends, however, that Congress did not intend to prohibit the Commission from using any regulatory tools currently used by the Commission in its regulation of telephone companies.[33] TMC supports the ratebase/rate of return standard as long as it is tailored to the cable industry's particular cost and financial structures.[34]

iii. Discussion

24. After careful consideration of the record, we adopt the cost-of-service formulation specified in the Notice. This formulation permits the regulated entity to recover its operating expenses and a fair return on investment, while protecting consumers from unreasonably high rates. In addition, while we are adopting in this proceeding rules of general applicability as part of our cost-of-service formulation, in individual cost proceedings, we can and will tailor our requirements to accommodate the special circumstances of individual cable operators. Thus, the requirements we adopt governing costs operators may recover in rates for regulated cable service establish presumptive standards that operators may seek to overcome in individual proceedings. In addition, although the cost-of-service requirements we are adopting are designed to be consistent with the ratebase/rate of return formula that has traditionally been used in public utility regulation, we plan to implement that formula in a manner that is simpler and easier to administer than the telephone model. We have also provided for streamlined cost showings for network upgrades, and have established provisions to address any extraordinary situations where our cost standards could create severe economic hardship. Our cost-of-service requirements will therefore permit us to address in individual cases any special circumstances cable operators may face in moving to a rate-regulated environment.

25. Commenters provide no feasible alternative model, nor any persuasive arguments against the ratebase/rate of return model. We disagree with commenters who contend that the ratebase/rate of return model contravenes congressional intent

---

[32] See, e.g., Time Warner Comments at 6; COA Comments at 3; Cablevision Systems Comments at 15. These commenters refer to House Report 102-628 at 83. Title II of the Communications Act is the statutory authority for the Commission's regulations governing telephone companies. Communications Act of 1934 as amended, Title II, §§ 201-228.

[33] GTE Comments at 5.

[34] TMC Comments at 8-9.

that we not replicate Title II regulation. Our primary approach to rate regulation of cable service, the benchmark/price cap approach, is not cost-based, and does not impose the concomitant regulatory burdens such as tariff and cost support obligations. The cost-of-service regulation adopted here is only a secondary approach. It is also a more streamlined approach than Title II regulation, requiring less detailed cost support and accounting, and imposing no annual or biannual filing requirements. Moreover, the Cable Act of 1992 requires that the Commission consider such factors as the cost of obtaining and transmitting certain types of programming, franchise fees, taxes, and a reasonable profit for cable operators.[35] Our ratebase/rate of return standard includes these factors, and thus implements, rather than violates, the statute.

26. While Congress was concerned that we not replicate Title II regulation, it did not intend that we produce a system that is far more generous to operators, and less generous to customers, than the result produced by the telephone model. The purpose of regulation in each case is to ensure reasonable recovery for the service provider, while protecting the interests of the consumer. We believe that the cost-of-service standards we are adopting will approximate the costs and rates of cable systems subject to competition. Inasmuch as cost-of-service ratemaking is a safety valve for cable operators who believe that rates set under the benchmark approach are insufficient for them, fair, traditional cost-of-service standards are appropriate.[36]

C. Procedural Issues

1. Frequency of Filing

27. We proposed in the Notice to limit the frequency with which cable operators could submit cost-of-service showings for the basic or cable programming services tiers, so that after a pending cost-of-service showing has been evaluated by the local franchising authority or the Commission, an operator could not present a new cost-of-service showing for some period of time.[37]

---

[35] Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C).

[36] We are accordingly rejecting most cable operator requests to include items in the ratebase or in allowable expenses that traditional rate regulation would not include, or to adopt valuation standards that would result in a larger ratebase and higher rates.

[37] Notice at ¶ 17.

28. Virtually all commenting parties agree that it is reasonable to set limitations on the frequency with which cable operators can submit cost-of-service showings for ratemaking purposes. Some local franchising authorities favor periods of two to three years,[38] while cable operators generally agree that a one-year period is sufficient.[39] Some parties endorse a waiver mechanism for mid-period filings if economic circumstances justify.[40]

29. We conclude that a period of two years is a reasonable frequency limitation. We believe that changes in both cost and revenue will be adequately reflected on this schedule. A two-year period also allows for the development of regulatory stability, and the reduction of regulatory burdens.[41] After setting initial regulated rates under either the benchmark or cost-of-service approach, absent a special showing, operators may not file a cost-of-service showing to justify a new rate for two years.[42] We are also adopting rate-setting procedures that

---

[38] See, e.g., New Jersey Comments at 4 (two years); Michigan Committee Comments at 6; Utah Comments at 6; New York Comments at 8 (all three years). But see Connecticut Comments at 2; MCATC Comments at 3 (one year).

[39] See, e.g., BC Comments at 7; Eagle Comments at 1; Media General Comments at 13.

[40] See Time Warner Comments at 20; Georgia Cable Comments at 6 (provide mid-year rate adjustments for recently-completed rebuilds); Municipals Comments at 11; MCATC Comments at 3.

[41] We may find it reasonable, following a cost-of-service showing, to set rates that include a scheduled reduction or other adjustment; or we may establish rates that are not expected to change, other than under the price cap, pending subsequent cost-of-service showings. As indicated, after the cost-based rate (with or without prescribed scheduled adjustments) is set, our price cap mechanism will govern.

[42] This two-year period will be measured from the effective date of the rates set in a local or Commission decision. Some parties have urged that we create a special waiver procedure for operators experiencing extreme financial hardship. Our rules generally provide for waivers; see 47 C.F.R. § 1.4. In addition, we have provided for hardship showings in some cases. Accordingly, we find it is not necessary to establish special waiver provisions concerning frequency of cost-of-service showings.

will be available to an operator in emergency situations, described more fully herein.[43] This approach will lessen the administrative burdens of duplicative cost-of-service showings, while furnishing operators a reasonable opportunity to recoup the costs of providing regulated cable services.

2. Procedural Limitations

30. In the Notice we solicited comment on whether we should establish procedural as well as frequency limitations on the submission of cost-of-service showings to justify rates higher than existing rates; we asked, for instance, whether we should require a demonstration of special circumstances or extraordinary costs before we would allow a cost-of-service showing. We also sought comment on whether it was reasonable to assume that operators set rates in an unregulated environment at levels that are fully compensatory, and whether we should therefore limit operators' ability to choose cost of service to set initial regulated rates at levels above pre-regulation levels.[44]

31. Cable operators uniformly oppose any obstacles to their electing cost-of-service regulation, and dispute the presumption that existing rates are fully compensatory.[45] These commenters believe that cost-of-service regulation should be freely electable as a full alternative to our primary benchmark/price cap approach.[46] NCTA argues that the Commission may not, consistent with due process, establish cost-of-service rules that are designed to discourage operators from seeking to establish cost-based rates.[47] CATA states that cost-based regulation should be an option for all operators, not just those with the resources to conduct such a proceeding.[48]

32. Several commenters state that the Commission should make this option available only in extraordinary circumstances

---

[43] See part X., infra.

[44] Notice at ¶ 18.

[45] See, e.g., BC Comments at 8; Continental Reply at 27-28.

[46] See, e.g., NCTA Reply at 5-7.

[47] NCTA Comments at 5.

[48] CATA Comments at 18.

because of the burden it would place on regulators.[49] Local franchising authorities generally believe that cost-of-service showings should be permitted only if: (1) existing rates prevent the operator from earning a reasonable rate of return on revenues from all services taken together;[50] (2) the operator has made a capital improvement of benefit to all subscribers;[51] or (3) the operator has experienced unanticipated special costs not arising from operational or financial mismanagement.[52]

33. We conclude that no "threshold" or further procedural limitation on the ability of cable operators to file cost-of-service showings is needed. We believe that the threshold created by the requirements we adopt today -- that operators may not, absent extraordinary circumstances, file more frequently than every two years, and that operators will be bound by the findings of the cost-of-service showing even if those findings result in a rate reduction and in refund liability -- will serve as an adequate safeguard against the filing of frivolous or unneeded cost-of-service proceedings.

3. Initiation of Cost-of-service Regulation by Local Authorities

34. Some local authorities urge the Commission to permit them to require further information of operators, and to initiate cost-of-service showings, if appropriate.[53] While franchising authorities are of course free to require supplemental information in the course of a cost-of-service proceeding, we will not adopt a provision that local franchising authorities can initiate cost-of-service proceedings or general data collections, because we believe any benefits that might be derived from such a provision would be outweighed by the cost, and could conflict

---

[49] Utah Comments at 2-3; NATOA Comments at 7; Austin Reply at 4; Arthur Andersen Comments at 6-10.

[50] Austin Comments at 5.

[51] Michigan Committee Comments at 6-7.

[52] Municipals Comments at 13; Seaford Comments at 8.

[53] See, e.g., Connecticut Comments at 1 (permit local authorities to verify cost showings through detailed audits); Seaford Comments at 8 (permit local authorities to require operators to file annual ARMIS-like reports, thereby allowing local regulators to initiate cost proceedings preemptively when costs reach levels sufficient to justify the expense of a new proceeding).

with the statutory requirement to minimize administrative burdens of rate regulation.[54] Moreover, we believe that our primary benchmark/price cap approach to setting rates will assure that rates for regulated cable service are reasonable. Accordingly, we will not provide that local authorities may initiate cost-of-service regulation.

4. Cost of Service Form

35. In order to reduce the administrative burdens of cost-of-service regulation, we proposed in the Notice to require that cable operators electing cost-of-service regulation present cost-of-service showings for both the basic service tier and cable programming services tier on a uniform FCC-prescribed form and associated worksheets.[55] Cable operators and local franchising authorities generally support our proposal,[56] although Time Warner argues that the Commission lacks the required experience to design a suitable form.[57]

36. We believe that use of a uniform cost of service form holds several advantages. Use of a form will lessen administrative burdens for industry and regulators by providing uniformity in presentation and review of cost information. The cost of service form will provide a clear standard for the cost support required from operators, and permit easy comparison with previously filed information.[58] Accordingly, we adopt a form that operators seeking to justify rates based on cost of service are required to use.[59] We also adopt a simplified version of

---

[54] Communications Act, § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

[55] Notice at ¶ 19.

[56] See, e.g., Cablevision Systems Comments at 43; TMC Comments at 9; Michigan Committee Comments at 7-8; MCATC Comments at 5; New Jersey Comments at 3-4.

[57] Time Warner Reply at 7.

[58] We also require that cable operators submit with their cost-of-service form, FCC Forms 1200, 1210, 1211, and 1215 to show the rate that will be permitted under the benchmark/price cap approach.

[59] Contrary to Time Warner's contention, we have had significant rate regulation experience and are confident that we can design, and have designed, a suitable form. Form 1220 is the general cost of service form in hard copy; Form 1225 is the

this form, for use by small cable systems. The requirements for these forms are provided with particularity in the instructions for each form.[60] See also parts V. and VI., infra.

III. Required Cost Showing

A. Ratebase

37. Under traditional ratebase/rate of return principles, it is necessary to determine the allowable ratebase both to calculate the return or profit component of the revenue requirement and to compute the earned rate of return.[61] In this section we adopt an interim approach to valuation of ratebase for purposes of determining rates based on cost of service showings. Specifically, we adopt the used and useful and prudent investment standards to govern amounts that may be included in ratebase. We determine that tangible plant in service shall be valued at original cost, but that, where records of original cost are not available, we will permit valuation of tangible plant at the book value assigned by the acquirer of the system provided that the operator shows that book value reasonably approximates original cost. We also permit certain intangible costs to be included in the ratebase as described below: accumulated start-up losses,

---

simplified version of the cost of service form, for small systems, in hard copy. We are releasing these forms in a separate document. The Commission will endeavor to make these forms available in electronic format. Operators may attach additional worksheets to explain form entries or unusual circumstances.

[60] For purposes of evaluating proposed rates in pending cost-of-service proceedings for the period that commences after the effective date of our new rules, we require that all cable operators with pending cost-of-service proceedings for any regulated tier file the cost of service forms that we are adopting with this Report & Order by . The deadline for filing this supplemental information is July 14, 1994.

[61] See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 26 (1987), Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F2d 776 (D.C. Cir. 1990), decision on remand, 7 FCC Rcd 296 (1991) (Ratebase Order), aff'd sub nom. Illinois Bell Tel. v. FCC, 988 F2d 1254 (D.C. Cir. 1993) (Illinois Bell). Ratebase traditionally consists of plant in service, noncurrent assets, materials and supplies, and cash working capital.

customer lists, and franchise rights. To the extent that a certain cost is excluded from the ratebase under these standards, the operator is permitted to present evidence to overcome some or all of the disallowance by showing that these costs benefit subscribers.[62]

1. Used and Useful, Prudent Investment Standards

38. In the Notice, the Commission sought comment on costs that should be included in plant in service, the largest portion of the ratebase.[63] We tentatively concluded that we should apply the used and useful and prudent investment standards to the original construction cost of assets dedicated to regulated cable service to determine the costs that may be included in plant in service in the ratebase.

39. Of the parties that commented specifically on the Commission's proposal to adopt the used and useful and prudent investment standards, the majority supported the Commission's tentative conclusion.[64] The used and useful and prudent

---

[62] Disallowance from the ratebase under our rules prohibits the operator only from recovering these costs from regulated ratepayers; our rules do not forbid an operator's recovering these costs from consumers of nonregulated services.

[63] Notice at ¶ 32.

[64] See, e.g., New Jersey Comments at 6; Michigan Comments at 13; Municipals Comments at 18-19; Seaford Comments at 10; Utah Comments at 13. Austin further asserts that no investment should be recognized for the purpose of establishing regulated rates unless the benefits to subscribers to the regulated services outweigh the costs. Specifically, Austin says that a cable company should not be allowed to inflate the investment attributable to basic and expanded basic cable service tiers when it upgrades a system primarily to provide advanced, nontraditional services. Austin Comments at 3, 9-11. Continental characterizes these comments as suggesting that franchising authorities should have the right to exclude from the ratebase those investments which they feel are of insufficient benefit to all subscribers. It contends that granting that untrammeled right to franchising authorities is inconsistent with the Cable Act of 1992 and the cable industry, because if the investment needed to deliver the many niche video services (i.e., those without the mass appeal of networks such as ESPN, CNN, and USA) is removed from the ratebase, operators will have an incentive either to add niche services to a more expensive tier or not to add them at all, defeating the Act's principles of

investment standards allow into the ratebase portions of plant that directly benefit the ratepayer, and exclude any imprudent, fraudulent, or extravagant outlays.

40. We believe that adoption of this approach best fulfills our statutory mandate to ensure that regulated cable service rates are reasonable while allowing operators to earn a reasonable return on their investment, and reducing regulatory burdens.[65] The prudent investment standard strikes a fair balance between consumer and cable investor interests in that it protects consumers from subsidizing plant not prudently invested in, while allowing cable operators to recover their costs prudently invested in regulated cable service.[66] The used and useful standard ensures that subscribers pay for only those portions of plant that are used and useful in the provision of regulated cable services. The standard is also familiar to this Commission as the standard we have applied to telephone companies, and should thus be simple to apply and administer.[67] This approach will thus allow us to achieve a fair balance of consumer and investor interests in determining regulated cable service rates under our cable cost of service standards.

---

expanding choice and encouraging upgrades. Continental Reply at 7. We believe that the accounting and cost allocation rules we adopt today adequately address these concerns.

[65] Communications Act, § 623, 47 U.S.C. § 543.

[66] See Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (Hope); see also American Telephone and Telegraph Co., 64 FCC 2d 1, 47 (1977).

[67] The Commission has traditionally applied the prudent investment and used and useful standards to communications common carriers under rate of return regulation. See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269 (1987); American Telephone and Telegraph Co., 64 FCC 2d 1 (1977), recon. in part, 67 F.C.C.2d 1429 (1979); and American Telephone and Telegraph Co., 9 F.C.C.2d 30 (1967). For a discussion of basing utility rates on used and useful assets, see Reagan v. Farmer's Loan and Trust Co., 154 U.S. 362 (1894); Stone v. Farmer's Loan and Trust Co., 116 U.S. 307 (1886); and Munn v. Illinois, 94 U.S. 113, 134 (1877). For a discussion of the valuation of used and useful assets as net investment in plant and property, see Los Angeles Gas and Electric Co., v. Railroad Comm'n of California, 289 U.S. 352 (1933); Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352 (1923); and San Diego Land and Town Co. v. Nat'l City, 174 U.S. 739 (1899).

2. Valuation of Plant in Service

41. In the Notice the Commission proposed establishing standards to determine the value of plant in service that cable operators may include in the ratebase.[68] We requested comment on various approaches to determining the value of plant included in the ratebase, including: market value, original cost, replacement cost, reproduction cost, or a combination of these approaches.[69] The Commission noted that under applicable judicial precedent, regulators have wide discretion to select a methodology for purposes of valuating ratebase, provided the end result is reasonable, and that we would select the approach that best implements our balancing of goals for cost-based rates of cable service.[70]

42. We also solicited comment on how each methodology would affect systems under original ownership and those that have been refinanced or rebuilt. Furthermore, we sought comment on whether we should adopt one valuation methodology for determining initial regulated rates under a cost-of-service showing and another for assessing proposed increases in rates of regulated cable services under subsequent cost-of-service showings.[71] We tentatively concluded that the Commission should adopt an original cost methodology to determine the value of a cable operator's plant in service for ratebase purposes.[72]

a. Market Value

---

[68] Notice at ¶ 33.

[69] Id. at nn.35-38.

[70] Id. at ¶ 33. See Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989); Hope, 320 U.S. at 602.

[71] Notice at ¶ 33. Because we anticipate no 'subsequent' cost-of-service proceeding for at least two years after the effective date of rates set in a cost-of-service proceeding, we defer consideration of the issue of whether we should adopt a different valuation methodology for assessing proposed rate increases under subsequent cost-of-service showings until after our adoption of final rules here. Although we see no need for separate methodologies for subsequent showings, and no party here has made an argument in support of such separation, we will be better able to evaluate this question after completion of the industry-wide cost studies initiated in this proceeding.

[72] Id. at ¶ 35.

43. In the Notice we said that under the market value approach to valuation of plant, plant in service would be valued at the fair market value of assets at the time they are acquired.[73] Several cable operators argue in favor of a fair market value approach to valuating plant.[74] These operators argue that this approach is administratively easy -- that valuation will be readily ascertainable because cable systems are often sold at market value.[75] It should be noted, however, that operators supporting a market value approach favor differing methods. For example, CATA argues in favor of a current market value approach to ratebase.[76] Others think that valuing cable assets at their actual market value as of the date of regulation might reflect capitalized monopoly profits.[77] As an alternative approach, these parties advocate a competitive market value, under which assets of the cable operator would be valued according to their actual market value, less any quantifiable capitalized monopoly profits.[78]

---

[73] Id. at n.35.

[74] See, e.g., Comcast Comments at 29-30; Medium Operators Comments at 2 (asserting that cable operators have a constitutional right to earn a fair return on the present market value of the system and, therefore, the Commission must adopt a market value approach); NCTA Comments at 10; Comcast Comments at 11-12; COA Comments at 67; COA Reply at 31.

[75] See, e.g., Comcast Comments at 11-12; CATA Comments at 14-15 and Attachment at 22 (arguing that use of this approach will produce the greatest value for subscribers, reward management efficiencies, permit recovery of upgrade costs, and promote the efficient acquisition and transfer of cable systems).

[76] CATA Comments at 14-15. CATA specifically argues that market value should approximate reproductive cost of service (or replacement cost of service, depending on technological innovation) because it encompasses everything in the going concern, including recovery for superior management and other assets important in determining a firm's value. CATA Comments, Attachment at 24.

[77] See Cablevision Industries Comments at 31.

[78] Id. See also Viacom Comments at 14, 15, 33, 36-39, and Attachment at 18-27; Time Warner Reply at 2 and Appendix at 4-5. This approach requires that the percentage of a cable company's value that represents monopoly profits be determined through an "event study" which tracks the stock market response to passage of the Cable Act of 1992 and benchmark regulation. Cablevision

44. Several parties argue against the market value approach. For example, Bell Atlantic argues that this approach is flawed by its inherent circularity because in a regulated environment market value is the result of regulation, rather than the starting point.[79] Austin argues that one should not rely on the market value of cable systems for determining ratebase because prices paid for systems are based on expected revenues, regardless of whether these expected revenues are based on reasonable rates.[80]

b. Original Cost

45. Original cost was defined in the Notice as the initial construction cost of the property, adjusted for all subsequent capital transactions including depreciation, retirements, and improvements.[81] Numerous parties, including local and state governments and telephone companies, support an original cost approach.[82] Bell Atlantic suggests that the Commission use original cost, less depreciation, to determine rates for both the original owner and subsequent purchaser.[83] Some parties support the use of original cost, arguing that using original cost will permit the operator to recover the costs of constructing the plant that is used and useful in the provision of regulated cable service, and will produce the lowest rates for consumers.[84] Bell

---

Industries Comments at 31.

[79] Bell Atlantic Comments, Appendix at 16.

[80] Austin Reply at 12.

[81] Notice at n.36.

[82] See, e.g., Michigan Committee Comments at 13; Municipals Comments at 19; Seaford Comments at 11; Utah Comments at 13; GTE Comments at 21; New Jersey Comments at 6; Bell Atlantic Comments at 22 and Appendix at 16; New York Comments at 5; see also ETC Comments at 3.

[83] Bell Atlantic Comments at 22 and Appendix at 16. Comcast argues against this approach because it could exclude 90 percent of the invested capital for cable systems which were sold in the late 1980s. Comcast Reply, Appendix at 5, 26-27.

[84] See, e.g., Utah Comments at 14; Michigan Committee Comments at 14; Bell Atlantic Comments at 23 (adding that the Commission should adopt the same ratebase approach for the telephone and cable industries so that the cable industry does

Atlantic believes that original cost will be the easiest methodology to administer and prove.[85] But New York, which argues in favor of this methodology, warns that original cost may be difficult to determine, because of the frequency of cable system turnover.[86]

46. Small Systems argues in favor of original cost if the Commission adopts the definition found in AT&T v. United States, "the actual money cost of (or the current money value of any consideration other than money exchanges for) property at the time when it was first dedicated to public use, whether by the accounting company or by a predecessor public utility."[87] Small Systems states that for an original owner, the original cost of the system should not be difficult to determine, and that where original cost information is not available, the Commission should use reproduction cost.[88]

47. The majority of cable operators argue against the original cost approach.[89] Two operators argue that use of this

---

not gain an unfair advantage). Small Systems agrees that the original cost approach is fair, as long as operators are also permitted to recover their other, unrecovered costs such as start-up expenses, budgeted capital expenditures, interest, and deferred depreciation. Small Systems Reply at 16, 18-19.

[85] Bell Atlantic Comments at 22-23. Austin agrees, arguing that even if, as the industry claims, there is a lack of records documenting original cost this can be taken care of on a case-by-case basis, using the net book value for tangible assets or industry-wide data for comparable systems. Austin Reply at 19.

[86] New York Comments at 5.

[87] Small Systems Comments at 10, citing AT&T v. United States, 299 U.S. 232, 242-243 (1936). See also Viacom Comments at 16-21; Cablevision Systems Comments at 17, 30 (under this approach, for all cable systems acquired prior to regulation, original cost would be the current operator's net acquisition cost, thereby eliminating the concept of excess acquisition costs). This approach does not comport with our definition of original cost and is accordingly deferred to discussion in 'Other Approaches,' part III.A.2.d., infra.

[88] Small Systems Comments at 10, n.13.

[89] See, e.g., Avenue TV Comments at 2; BC Comments at 10; CATA Comments at 14; COA Comments at 52; Georgia Cable Comments at 18; Eagle Comments at 3; Medium Operators Comments at 6-8;

approach would penalize cable systems that engage in long-term investment; it would provide strong incentives to operators of highly-depreciated systems to abandon serviceable plant and replace it with new, undepreciated plant,[90] and would produce disincentives for investment in infrastructure.[91] Some operators also argue that use of original cost produces rates that are substantially lower than competitive levels.[92]

48. Other operators argue that acquired systems often lack records for ascertaining original cost, or that it is simply impractical to use such an approach.[93] Some argue that use of original cost distorts the ratebase because it fails to include inflation, or operating losses for years prior to rate regulation.[94] Others argue that plant may be fully depreciated, leaving original cost minimal; in that case, they assert, using original cost would not provide an accurate or fair assessment of assets.[95] Several parties assert that courts have held that the additional amount of value over book must be considered in setting rates, and that to fail to do so would be unfair,

---

Summit Comments at 7; Viacom Comments at 16; Time Warner Comments at 29; Cablevision Industries Reply at 5.

[90] Avenue TV Comments at 2 (stating that the use of original cost for plant valuation would force it to buy unneeded new plant, using high-cost loans, to replace heavily-depreciated but serviceable plant. When a more reasonable plant value is assigned, Avenue TV states, it can upgrade and replace plant as needed from within its operating budget. Thus reliance on original cost produces inefficiency and higher rates).

[91] TMC Comments at 12 (original cost approach causes ratebase to be minimal, providing little if any capital for infrastructure development).

[92] See, e.g., Cablevision Industries Comments at 29-30.

[93] See, e.g., COA Comments at 51-52 and White Paper Attachment at 36-38; Continental Comments at 41-43 (using original cost would require such steps as restating gross assets and restating depreciation reserves to match the new value of assets); Georgia Cable Comments at 18-19.

[94] See NCTA Comments at 11; Continental Comments at 26.

[95] See, e.g., Time Warner Comments at 29; TMC Comments at 12.

confiscatory, and contrary to public policy.[96]

c. Replacement Cost and Reproduction Cost

49. In the Notice we defined replacement cost valuation as valuing plant at the cost of building a new "state of the art" facility.[97] We defined reproduction cost as the present cost to construct the plant that is in service.[98]

50. TMC recommends use of replacement cost methodology because, TMC argues, it allows plant upgrades and takes advantage of cost efficiencies that result from this development to keep rates reasonable.[99] Other parties, however, oppose the use of replacement cost as burdensome and unreliable.[100]

51. Several parties argue in favor of reproduction cost, depreciated.[101] Others oppose this approach, arguing that determining the cost of reproducing an old system makes no sense in determining the value of the capital committed to the

---

[96] See, e.g., Continental Comments at 26-27 (citing McCardle v. Indianapolis Water Co., 272 U.S. 400, 414 (1926)); NCTA Comments at 7-8. Viacom states that original cost should not be applied to systems that were acquired at arm's length during the period of deregulation between the Cable Act of 1984 and the Cable Act of 1992 because there would be no excess acquisition costs during this period. Viacom Comments at 20-21.

[97] Notice at n.37.

[98] Id. at n.38.

[99] TMC Comments at 12. TMC recommends that the Commission, to ensure the continuity of replacement costs in the industry, monitor the reasonableness of costs assigned by operators in light of the technological features of each system.

[100] See, e.g., COA Comments at 27; Continental Comments at 27; ETC Comments at 3 (claiming that the replacement cost approach is speculative and results in allowing a return on assumed or hypothetical standards rather than actual investments); Bell Atlantic Comments, Appendix at 17 (it is burdensome, lacks objectivity, and has been largely abandoned by other regulatory commissions).

[101] See, e.g., Small Systems Comments at 10, n.13.

enterprise.[102]

d. Other Approaches

52. Several parties advocate a "fair value" approach to valuation of plant in service.[103] Fair value is the current market value of the property placed in service, and may be determined in several ways, including market value and replacement cost. Several parties also advocate other approaches, including an operating ratio analysis to test the reasonableness of rates;[104] ratebase equal to the invested capital on the books with a transition to original cost over a ten-year period;[105] or a current value (trended original cost) approach.[106]

e. Discussion

53. We conclude that an original cost approach is most likely to produce fair and reliable valuations of plant in

---

[102] COA Comments at 66-67; Continental Comments at 28 (such calculations are inherently subject to inaccurate predictions, and would fail to reflect the capital which must be committed to a new build, sustaining start-up losses and deferred returns through the initial years of development).

[103] See, e.g., Summit Comments at 7 (fair value of all assets belong in the ratebase and should be depreciated and amortized over their useful lives); Bell South Comments at 16 (allow the assets to be recorded at fair market value, in accordance with Generally Accepted Accounting Principles (GAAP), with cost in excess of fair market value of the assets recorded as goodwill); COA Comments at 52 (the Commission should use fair value at the time the operator's property is first devoted to public use); Comcast Comments at 29 (industries initially subjected to regulation typically received a return based on either system replacement costs or fair market value). (See also Comcast's "Z factor" proposal, discussed in III.A.2.e., infra.)

[104] COA Reply at 32-33, n.65.

[105] Comcast Reply, Appendix at 26.

[106] Arthur Andersen Comments at 25-32. The Commission would use a transitional approach to establish a current value for the property, plant and equipment of the cable operators as of the date the Cable Act of 1992 was enacted, which would be the fair market value of the original trended cost of the system. The commenter describes how this approach would operate, and asserts that this methodology would balance our stated concerns.

service, and allows us the best opportunity to balance operators' reasonable recovery of costs with consumers' payment of rates that reflect only costs reasonably incurred in providing regulated service. We find that none of the other valuation approaches provides the same reliability and fairness as this approach.[107]

54. For purposes of our cable cost-of-service rules, we define original cost as the actual money cost (or the money value of any consideration other than money) of property at the time it was first used to provide cable service. Costs for both constructed and purchased systems will be subject to scrutiny by the appropriate regulatory authority to determine whether the investment was prudent and the plant is used and useful.[108]

55. Original cost is the normal, now traditional method used for public utility valuation, and is the method this Commission has long used for telephone companies. By relying on actual expenditures rather than speculative or contentious valuation methods, original cost is far more likely to achieve the desired result: reasonable rates for customers, a fair opportunity for a reasonable return for operators, and reduced administrative burdens.[109] The practical benefits of original cost valuation in general are that it is less administratively burdensome on all involved, and well understood.

56. Thus, unlike the other valuation approaches, original cost does not require estimates of current values that may be difficult or expensive to determine, and that are in any event likely to be largely matters of opinion. Unlike market-based valuation methods, it does not present the problem of circularity, where the valuation method chosen itself affects the

---

[107] We discuss infra the shortcomings of other approaches.

[108] The regulator may examine whether the construction costs were reasonable, whether plant is operating at a reasonable level of capacity, and whether costs are properly apportioned between regulated and nonregulated activities. In this respect we require operators subject to regulation under Section 623 of the Communications Act, 47 U.S.C. § 543, to keep, maintain and protect records subject to regulations adopted in this Report and Order for a period of not less than 5 years. We have authority to take this action under Sections 4(i) and 623 of the Communications Act, 47 U.S.C. §§ 4(i) and 543.

[109] For a history of the development of and debate over valuation methods in public utility ratemaking, see I. Kahn, The Economics of Regulation 40-41 (1988).

value that the market is likely to place on the system. It is also not constantly changing as the economy, technology, and customer needs change. Original cost valuation is also recognized and defined, and used for financial accounting purposes, as part of Generally Accepted Accounting Principles (GAAP). Indeed, it has been this Commission's policy in recent years to bring its regulatory accounting into conformance with GAAP as far as possible.[110] Use of original cost for cable systems will help implement this policy and minimize regulatory accounting burdens.

57. These practical benefits are particularly significant for cable system regulation, where Congress has expressly directed us to reduce administrative burdens. Use of original cost should reduce administrative burdens because it does not require appraisals or other methods of assessing value at a later date, and it is the most familiar method for regulatory cost of service studies. Original costs also are likely to be far less contentious because they can generally be objectively verified by reference to actual construction records and, for many operators, are readily available. On a going forward basis, operators should easily be able to keep track of these costs. To the extent that original costs may not be readily available to operators who have acquired systems, estimated original costs may be used. We have also modified the original cost approach, as we discuss below, to permit the use of book value if it approximates original cost.

58. We recognize that original cost valuation, like any valuation methodology, has theoretical limitations -- in this case, that it is a backward-looking approach to costs. However, these limitations do not prevent it from being a practical, workable foundation for establishing value of tangible plant in service.[111] To the extent that use of original cost for computing the ratebase affects the risks that investors may assign to cable systems, we can take account of such risks in determining a

---

[110] See, e.g., Revision of Uniform System of Accounts, Classes A, B, and C Telephone Companies, CC Docket No. 78-196, Report and Order, 51 Fed. Reg. 43498, Dec. 2, 1986. Continuing this Commission's reliance on GAAP, we direct that GAAP shall generally apply in our regulation of cable rates, unless specifically noted otherwise.

[111] Parties asserting that the Commission must allow additional amounts are incorrect. Original cost has been explicitly accepted as a reasonable method of ratebase valuation, provided the end result of the ratemaking process cannot be said to be unjust and unreasonable. Hope, 320 U.S. 591.

reasonable rate of return that will allow the system to operate successfully and attract the necessary capital. Thus, in setting the rate of return here we have adopted a rate toward the high end of the zone of reasonable returns, as a cautious approach to assure continued incentives for future investment.

59. The original cost approach is also consistent with the objectives of the Cable Act of 1992. The Act directs this Commission to consider various factors in establishing criteria for evaluating the reasonableness of rates, including reducing administrative burdens, and taking into account direct costs, joint and common costs, advertising and other revenues, franchise fees and taxes, franchise requirements, and a reasonable profit.[112] It does not direct us to include other acquistion costs. The adoption of the original cost valuation method allows us to meet express statutory concerns; i.e., original cost valuation excludes costs that would not have arisen in a competitive environment, and a primary factor in our evaluation of cost-of-service showings is the rates for cable systems subject to effective competition.[113]

60. While it might be possible to develop a different valuation approach, including one of the various approaches suggested by cable operators, we perceive no reason to believe that any one of those methods would better carry out the purposes of the Cable Act. Approaches based on market value at the time of acquisition are likely to include expectations of supra-competitive profits that would be difficult to disentangle from other aspects of market valuation, such as the expectations at the time of the growth and profitability of unregulated services. We also believe that the commenters favoring market valuation methods understate the practical difficulty of applying sale prices of some systems or trends in stock prices to setting a market price for other systems. Certainly these methods are more complex than use of original cost, even if they could be developed into a reliable valuation method that excludes supra-competitive earnings and non-regulated activities. To the extent that acquisitions occurred at different times in the past, those expectations are also likely to have varied, and use of the full acquisition price is thus likely to produce uneven and unreliable valuations. Moreover, the full acquisition price might well represent an imprudently high purchase price rather than a fair valuation for customers, even if it was arrived at on an arm's length basis at the time.

---

[112] Communications Act, § 623(b)(2), 47 U.S.C. § 543(b)(2).

[113] Id. at § 623(b)(1)(C)(i) and (c)(2)(B).

61. An attempt to apply a market value test as of the date of the adoption of the Cable Act in 1992 or at some later date presents similar problems of circularity, assessment of investor expectations, and allocations to regulated services. In practice, these issues have proven very difficult to solve in developing workable public utility ratemaking mechanisms. What has proved workable, even if far from simple, has been use of original cost for valuation, and assessment of market requirements for return in the setting of an allowable rate of return based upon that valuation method. The Cable Act of 1992 does not state or imply that the Commission must take into account the market value of cable systems in evaluating reasonable rates, and we conclude that use of market value in setting the value of plant in the ratebase would be less workable, and would not result in more reasonable rates, than use of original cost in implementing the 1992 Cable Act of 1992.

62. Similarly, we reject the replacement cost, reproduction cost and fair value approaches as unwieldy, difficult to apply consistently, and likely to produce ratebase values that would not generate reasonable rates. Estimating the cost of replacing a system or reproducing it would likely prove a contentious exercise in competing opinions concerning, for example, current construction costs, best practices, and choices of technology. Attempts to implement a fair value approach have also historically proved unworkable.

63. We also are unpersuaded that the other methods proposed are preferable to original cost in carrying out the purposes of the Cable Act of 1992. COA's suggestion in its reply comments that an operating ratio analysis could be adopted to test rates seeks to draw an analogy to cases such as transit utilities where the ratebase is very small.[114] It is improbable, however, that the cable industry, with its heavy capital investment in facilities, is analogous to situations where operating ratio approaches have been adopted.[115] This and other approaches, such as Comcast's "Z factor" proposal, Arthur Andersen's trended original cost proposal, and BellSouth's proposal for amortization of goodwill, appear primarily to be approaches seeking to include in the ratebase some portion of excess acquisition costs. We discuss these approaches and the extent to which acquisition costs may appropriately be included in the ratebase in a later

---

[114] COA Reply at 32-33.

[115] It is also not clear what expenses COA would include in operating expenses or what ratio it would consider appropriate. See COA Reply at 32-34.

section of this decision.[116]

64. Commenters arguing that original cost is often simply unascertainable were numerous and insistent, and we believe that there may be some validity in this concern in some cases for purchased systems. We note that telephone regulation provides for use of an estimated original cost when actual original cost is not available.[117] Because this approach creates the need for individual scrutiny not only of the estimated original cost but also of underlying 'particulars,' it is not our preferred alternative to original cost for cable services regulation. However, in the event that an operator does not possess adequate records of original cost, we will permit an operator to estimate original cost. The operator will be required to show the basis for the estimate with supporting documentation. In addition, we will permit valuation of tangible plant in service at the book value recorded by the operator at the time of acquisition, if the operator can demonstrate that book value approximates original cost.[118]

65. We believe that this approach to valuation strikes a fair balance between the interests of ratepayers and investors, and that it will produce reasonable rates for subscribers while allowing operators to recover costs that they have prudently incurred for plant that is used and useful in the provision of regulated cable service. Under this approach, cable operators will be able to attract capital, and will have an opportunity to earn reasonable earnings. The original cost approach will also protect consumers from paying for costs inappropriately incurred by operators, or for monopoly rents.[119] Finally, it will help in

---

[116] See infra part III.A.3.

[117] Part 32 of the Commission's rules, USOA for telephone companies, defines original cost as "the amount of money paid (or current money value of any consideration other than money exchanged) for the property (together with preliminary expense incurred in connection with the acquisition)." 47 C.F.R. § 32.2000(b)(2)(i). This is the definition we used in the Notice, and that we adopt here. The rule then states: "When the actual original cost cannot be determined and estimates are used, the company shall be prepared to furnish the Commission with the particulars of such estimates." 47 C.F.R. § 32.2000(b)(2)(ii).

[118] All cost showings for acquired systems must include the book value of tangible plant in service as recorded at the time of acquisition. See Cost of Service Form 1220.

[119] See Cable Act of 1992, § 2(b)(4).

reducing administrative burdens on both cable operators and regulatory authorities in the administration of our rate regulations by permitting reliance on estimated original cost or book value in some cases.[120]

66. The original cost valuation approach for tangible plant in service is also consistent with the Act because it will allow operators to develop rates that approximate the rates that would have developed in a competitive market, and will thus protect subscribers from paying inappropriate costs and unreasonable charges[121] that reflect operators' expectations of noncompetitive earnings or earnings from non-regulated activities.[122] This approach also assures operators' ability to respond to competitive forces by means of facility and service requirements, because it allows them to recover costs prudently invested in plant that is used and useful in the provision of regulated cable service. We also believe that by instituting an original cost approach to initial determination of ratebase, we are setting the groundwork for a level playing field for the telephone companies and cable companies, because our telephone company valuations are also based on original costs.

67. As several parties have noted, Congress identified the goal of ensuring that cable operators continue, where economically justified, to expand their telecommunications infrastructure.[123] The Commission agrees that cable operators can, and should, contribute to the continued development of an advanced telecommunications infrastructure. Contrary to some commenters' suggestions, we believe the approach we adopt today

---

[120] See Communications Act, § 623(b)(2)(A).

[121] See Utah Comments at 14; Michigan Comments at 14.

[122] See Cable Act of 1992, § 2(b)(4).

[123] Cable Act of 1992, § 2(b)(3); see also Telephone Company-Cable Television Cross-Ownership Rules, 47 C.F.R. §§ 63.54-63.58, Notice of Inquiry, 2 FCC Rcd 5092 (1987), Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849 (1988), Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991), recon. granted, 7 FCC Rcd 5069, appeal pending sub. nom. National Cable Television Assoc., Inc. v. FCC, No. 91-1649 (D.C. Cir. filed Dec. 26, 1991), Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), petitions for recon. pending, appeal pending sub. nom. Manakato Citizens Telephone Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

allows operators to participate in the development and establishment of a modern telecommunications infrastructure, by assigning a reasonable value to tangible plant in service and permitting operators to recover that value in rates for regulated cable services.

3. Additions to Ratebase

a. Accumulated Start-Up Losses

i. Notice

68. In the Notice we remarked that some operators may have expensed, rather than capitalized, some expenditures which have resulted in the creation of assets with future economic value.[124] We noted that the application of certain depreciation practices may have resulted in a general undervaluation of property, plant, and equipment on the books of cable operators as the industry comes under regulation, and that financial losses in the industry may be due in some part to write-offs of various organizational and development costs, and to use of accelerated depreciation practices. We sought comment on the appropriate treatment of accumulated losses, noting that it might be reasonable to view such losses as capital invested with an expectation of recovery in future periods as the industry reaches maturity. We asked whether these losses should be amortized over some future period, and whether a return should be allowed on such unrecovered amounts until they are fully recovered.

ii. Comments

69. In response, several parties contend that cable operators incur more substantial early losses than traditional utilities.[125] Small Systems argues that start-up losses, deferred

---

[124] Notice at n.44.

[125] See, e.g., COA Comments at 50 (cable operators have routinely expensed start-up costs resulting in operating losses in the early years of operation), White Paper Attachment at 24; Cablevision Systems Comments at 6-9, 25 (these losses were incurred in an unregulated environment with the expectation that they would be recovered); California Cable Comments at 34. A regulated firm, COA asserts, would have capitalized these start-up losses and recovered them in later years. The fact that cable's accounting has not yet created that regulatory asset does not mean that these amounts do not produce economic value even though they may be reflected only in goodwill or other intangible assets on the books of account. COA Comments at 50.

system development costs, and accumulated losses which operators invested to make their cable systems viable commercial operations should be recoverable.[126] Others add that these losses should be both capitalized (to include a return on investment), and amortized (to allow recovery of expense).[127] Many parties propose recovery methodologies and periods.[128]

---

[126] Small Systems Comments at 12-14 (defining start-up expenses as the "excess of expenditures required to build and operate the fixed plant over revenues received from the initially small subscriber base.") Small Systems notes that courts have recognized that the expense of financing construction and operating a facility during the early unprofitable years of operation is a legitimate expense which must be borne by the ratepayer. Tennessee Gas Pipeline v. FERC, 606 F.2d 1094 (D.C. Cir. 1979), cert. denied, 445 U.S. 920 (1980); McCardle v. Indianapolis Water Co., 272 U.S. 400 (1926). To allow these costs in the ratebase, Small Systems argues, does not constitute a requirement that future ratepayers provide retroactive compensation for some deficiency in the way the cable system is operated, but is merely fair recovery of the inevitable early expenses that permit the later subscribers to receive cable service. Small System Comments at 16. See also Arthur Andersen Reply at 11 (suggesting that this could be defined as the excess of total costs incurred over revenues during the start-up phase of the cable system, or that the Commission could establish benchmark amounts for average per customer acquisition costs); Cablevision Industries Comments at 25; Cablevision Systems Comments at 31-32; California Cable Comments at 33-34; COA Comments at 50, 54-55, 57-59; Continental Comments at 44; Media General Comments at 8; TCI Comments at 4; Small Cities Reply at 18-19.

[127] Cablevision Industries Comments at 24; see also Georgia Cable Comments at 25. COA asserts that accumulated losses should be allowed to be amortized over a ten-year period, with all unrecovered amounts (i.e., those initial losses that will never be compensated) receiving a fair return by their inclusion in the ratebase. COA Comments at 54-58 (noting that the Commission has allowed telcos to include deferred start-up costs in the ratebase). See also Medium Operators Reply, Appendix at 12.

[128] California Cable Comments at 40 (compare start-up costs to the treatment of construction work in progress or allow deferred cost recovery); Continental Comments at 48-49; Media General Comments at 8-11 (amortization period should be decided on an individual basis); Time Warner Comments at 21; Summit Comments at 5 (arguing that not allowing recovery of accumulated losses would have negative effects on small operators' ability to

iii. Discussion

70. We conclude that some accumulated start-up losses, to the extent that they reflect operating losses in the early years of the system, should be included in the ratebase. These losses could be considered to meet the used and useful standard in that it is frequently necessary for businesses during a start-up phase to sustain a period of losses prior to profitability. As such, the losses benefit customers because it is necessary for the operator to incur them in order to bring future service to subscribers.[129] We are also concerned, however, that current customers not be burdened with excessive or unreasonable costs from previous periods of operation, that cable operators' recovery of these costs not be unlimited in time, especially after the losses have been recouped, and that subscribers not pay for losses incurred in expectation of recovery of future supra-competitive profits.

71. Financial Accounting Statements Board Standard No. 51 ("FASB 51")[130] suggests that a two-year period is a reasonable and

---

raise future financing, and proposing a fifteen-year amortization period from the date of the first rate hearing). Medium Operators states that the amount of past losses to be recovered should be reduced by an estimate of the tax benefit received, but that such reduction should be allowed only for entities that are allowed to recover an allowance for taxes under the cost of service rules. Medium Operators Reply, Appendix at 25.

[129] The Commission has considered a similar issue before; we denied a Comsat request to establish a "return deficiencies" account that would have compensated Comsat for deficient returns during the early years of operation. Communications Satellite Corporation, 56 F.C.C.2d 1101, 1129-32 (1976). We recognize that the proposal we rejected in 1976 bears some resemblance to the startup cost allowance we are adopting for the cable industry. The startup allowance we are adopting here is, however, far more limited than the Comsat proposal, and the decision to deny Comsat's request was based in part upon a finding that other accounting and ratemaking decisions that were unique to Comsat adequately compensated Comsat for its startup costs. Therefore, we believe our decision to adopt a startup allowance here is not a departure from relevant Commission precedent.

[130] Statement of Financial Accounting Standards No. 51, Financial Reporting by Cable Television Companies ("FASB 51") establishes standards of financial accounting and reporting for costs, expenses, and revenues applicable to the construction and operation of cable television systems. Under these standards,

representative startup time for cable systems. We believe, based on the record, that this period would permit recovery of losses necessary for start-up of a cable system, and that a subscriber base is likely to be well established by the end of the second year of operation. We therefore allow recovery in the ratebase of accumulated start-up losses that are equal to the lesser of the first two years of operating costs or accumulated losses incurred until the system reaches the end of its prematurity stage as defined by FASB 51.[131]

72. These accumulated losses may be included in the ratebase, and the operator may earn on them the reasonable rate of return that we define below.[132] However, we do not believe that these accumulated losses should be included in the ratebase indefinitely. Instead, we will require that they be amortized[133]

---

when a cable system is partially under construction and partially in service (the prematurity period), costs incurred that relate to both current and future operations shall be partially capitalized and partially expensed. Under FASB 51, the prematurity phase of a cable television system is presumptively no longer than two years.

[131] We believe that losses incurred during this period are most directly linked to the creation of the system that is currently providing services to subscribers. Cable operators are, of course, free to make a showing that demonstrates the appropriateness of a practical adjustment to this rule in light of their particular circumstances. Operators are also free to present evidence to rebut disallowance of other accumulated losses. In challenging this or any presumptive disallowance, the operator must present detailed evidence demonstrating that the cost has produced a tangible benefit for subscribers that would not have existed but for the cost; and that the relevant plant is used and useful in the provision of regulated cable service, and represents a prudent investment. The operator may present evidence that allowance is necessary for compensatory rates. In making its determination, the regulatory authority should take into account the effect that allowance of this cost or costs will have on the operator's rates in comparison to rates that would have developed in a competitive environment, and whether allowance of these costs will produce reasonable rates.

[132] See part IV., infra.

[133] Amortization means the systematic recovery, through ratable charges to expense, of the cost of assets.

over a reasonable period.[134]
We determine presumptively that this amortization period should not be longer than fifteen years.[135] This amortization period should provide flexibility for operators, without burdening subscribers with unreasonable rates.

73. We conclude that other losses should be presumptively excluded from the ratebase: these include continuing operating losses after the system reaches maturity,[136] and accumulated losses associated with amortization of disallowed goodwill or interest expense associated with disallowed goodwill.[137] We believe that this treatment is appropriate because these costs presumably benefited past subscribers, or were incurred in the expectation of monopoly profits or profits from nonregulated activities, and thus should not be borne by current and future subscribers.[138]

---

[134] The operator must submit detailed evidence of the effect the amortization period has on rates in comparison to competitive rates of similar systems. The regulatory authority may after careful scrutiny revisit the amortization period if it will produce unreasonable rates. Unless otherwise provided by this Commission, amortization, for purposes of the rules adopted in this proceeding, shall be computed on the straight-line method, i.e., equal amounts shall be recovered in each year of the amortization period. We have applied this approach successfully in common carrier regulation; see 47 C.F.R. §32.2000(h).

[135] We will allow recovery of these costs only to the extent that they are recorded on the company's books as such. The amortization of allowed start-up losses must begin at the end of the prematurity phase of operation, and should generally be completed during the service life of the longest depreciable assets. We believe this will generally be no longer than fifteen years.

[136] For these purposes we conclude that a system reaches maturity as defined by FASB 51 (i.e., presumptively within two years).

[137] We also disallow operating losses incurred on investments that were imprudently made. See part III.A.1., supra.

[138] As stated, cable operators have the opportunity of making a showing to overcome this presumption: such a showing would demonstrate that these costs benefit current and future ratepayers, and that they were prudently invested in plant that is used and useful in the provision of regulated services.

b. Acquisition Costs, Intangibles, and Goodwill

i. Notice

74. In the Notice we observed that cable operators purchasing cable systems in an unregulated environment may have paid a price that exceeded the value of plant under our valuation methodology; we termed this an "excess" acquisition cost.[139] We stated that the legislative history of the Cable Act of 1992 reveals a congressional concern that pre-regulation cable system purchase prices may reflect the undue market power of cable operators not subject to effective competition -- that they are higher, in other words, than they would have been under more competitive market conditions. We tentatively concluded that excess acquisition costs, including portions assigned to goodwill, customer lists, franchise rights, and other intangible assets, should be excluded from the ratebase,[140] and we sought comment on whether such disallowance was Congress' intent.[141] We also sought comment on whether we should allow the amortization

---

Operators may also present evidence that allowance is necessary to produce compensatory rates.

[139] Notice at ¶ 36. As we noted there, the expression "excess" acquisition cost compares the cost of acquiring a cable system with the value of the plant, regardless of the valuation methodology selected. It does not necessarily imply that the acquisition cost was "excessive" or imprudent at that time. We noted that excess acquisition costs have traditionally been excluded from the ratebase of regulated entities, at least in part, because they are seen as inappropriate costs for ratepayers to bear.

[140] Id. at ¶ 40.

[141] Id. at ¶ 37. We sought comment on the extent to which cable operators might reasonably assign to the ratebase a portion of their excess acquisition cost as intangible assets, such as customer lists, franchise rights, or goodwill. See also id. ¶¶ 38, 39. We also solicited comment on how such assignments should be determined, and whether we should establish limits on cable operators' discretion to do so. We solicited comment on whether these amounts should be allowed in the ratebase and/or whether the Commission should recognize their amortization as a recoverable operating expense.

of such costs over time as an annual expense.[142] We stated that an equitable balancing of consumer and cable operator interests might require that some excess acquisition costs be allowed in the ratebase, in order to allow for the transition of the industry from a nonregulated to a regulated environment.[143]

ii. Comments

75. Several parties support the exclusion of excess acquisition costs from the ratebase,[144] and state that inclusion of these costs would reflect monopolistic expectations,[145] and

---

[142] Id. at ¶ 41 and n.45. We also asked what the amortization period should be for such assets, and for any intangible assets for which we allowed recovery.

[143] Id. at ¶ 39. We also requested comment on: whether there should be some provision for recovery of the return foregone in past years; whether the amount we allow should reflect a reduction for tax benefits received; whether there are specific elements, e.g., the subscriber list, for which provision should be made, but others for which no special provision should be made; and how, if consideration is to be given to previously written-off expenditures for customer lists, franchise rights and other organizational items, they should be valued now. Id. at n.44.

[144] See, e.g., Michigan Comments at 14; Utah Comments at 14; Connecticut Comments at 2; New Jersey Comments at 7; GTE Comments at 21; ETC Comments at 4; Arlington Comments at 1; Seaford Reply at 6; Austin Comments at 8.

[145] For example, CFA argues that the Commission must not allow operators to recover excess acquisition costs which reflect monopolistic abuses. CFA Comments at 3. See also NATOA Comments at 14; NATOA Reply at 6 (a purchasing operator makes a business judgment in determining the price he is willing to pay for a cable system; this decision reflects the operator's analysis of the potential value of the entire cable system and infrastructure, not just regulated services); GTE Comments at 21 (arguing only for exclusion of those costs incurred prior to October 1992); Bell Atlantic Comments at 23; Bell Atlantic Reply at 16 (Congress has determined that excess acquisition costs reflect monopoly profits). Arlington argues that inclusion of excess acquisition costs would produce artificially inflated rates, since subscribers would be forced to help amortize any acquisition price. Arlington Comments at 1.

would harm subscribers.[146] For example, Seaford argues that none of the purchase price of a cable system in excess of the value of plant in service should be allowed recovery as goodwill or intangibles, because that is merely the excess value which an unregulated monopolist can wring from its captive ratepayer.[147] Austin argues against allowance of intangible assets because courts have already decided, based on the industry's own representations, that monopoly cable companies do not have goodwill.[148] Other parties argue that excluding excess acquisition costs from the ratebase is consistent with general principles of utility regulation.[149] Bell Atlantic argues that allowing these costs in the ratebase would provide an

---

[146] Bell Atlantic Comments at 24-25; NATOA Reply at 6; see also Bell Atlantic Reply at 17; Austin Reply at 16 (arguing that incorporating monopoly profits into rates for regulated services is contrary to the goals of the Cable Act to protect consumers and to promote competition).

[147] See Seaford Comments at 11. Seaford argues that it is appropriate, however, to allow an operator to assign to goodwill and intangibles the value of the company name.

[148] Austin Comments at 8; Austin Reply at 15, citing Tele-Communications, Inc. v. Commissioner of Internal Revenue, 95 T.C. No. 36 (1990). Austin claims that TCI's experts in that case rejected the existence of goodwill in a monopolistic environment, and asserted that customers return only because they have no choice. Id. at 40. Austin quotes TCI's evidence as stating that a substantial part of the price paid for a system "stems from the prospect it offers to earn supernormal profits ..." Austin Comments at 8, citing "The Value of Three Cable TV Franchises," paper by William B. Shew submitted by TCI in above case.

[149] See Austin Comments at 8; Bell Atlantic Comments, Appendix at 19. Others add that the presumption can be overcome, but that the operator wishing to do so bears a heavy burden. GTE recommends that the Commission create a presumption that excess acquisition costs are monopoly rents, subject to rebuttal by cable operators on an individual basis or by waiver. GTE Reply at 26. Austin notes that the Commission has always insisted that the burden of proof is on the entity seeking to include excess acquisition costs to demonstrate that the price paid for property properly reflects its value to ratepayers or is otherwise in the public interest. Austin Reply at 18.

unjustified competitive advantage for cable over telephone.[150] Austin asserts that excess acquisition costs fail to meet the prudent investment test.[151]

76. Other parties suggest the possibility of a less stringent approach; for example, Aerie suggests that there may be a limited need for special treatment of excess plant or acquisition costs for those unaffiliated small companies that show that, absent the possibility of recovery of these costs, they may face reorganization or insolvency.[152] Michigan and Utah state their belief that exceptions to allowance of excess acquisition costs include reasonable allocations for goodwill, customer lists, and franchise rights.[153]

77. Cable operators argue, however, that calling their acquisition costs "excess" is unfair, and that these costs do not

---

[150] Bell Atlantic Comments at 24. See also ETC Comments at 4 (asserting that allowance of these costs may result in a daisy-chain of buy-sell and may produce a disincentive to replace obsolete equipment with more modern equipment).

[151] Austin Reply at 18, 11 (Congress and the FCC have both concluded that discrepancies between replacement and purchase costs, i.e., Tobin's Q, reflect a significant level of monopoly power in the cable industry; even taking criticisms of Tobin's Q into account, evidence shows that the excess acquisition prices paid for cable systems have been based on investor belief that cable was an unregulated monopoly). But see Continental Comments at 33 (the Commission is wrong to assume that acquisition premiums represent uneconomic excesses of the exercise of market power as measured by Tobin's Q). MCATC agrees that these costs should be excluded on a going-forward basis, but states its reservations about the fairness of disallowing acquisition costs incurred by cable operators prior to passage of the Cable Act of 1992. MCATC Comments at 7.

[152] Aerie Comments at 11. Blade argues for an approach that allows for recovery of reasonable acquisition costs without rewarding irresponsible operators who engaged in speculation and acquired systems without equity. Blade Reply at 3-4. Time Warner and TCI argue for a case-by-case approach to the allowance of excess acquisition costs. Time Warner Comments at 31-32; TCI Comments at 19-22.

[153] Michigan Comments at 14; Utah Comments at 14. But see New Jersey Comments at 7 (if excess acquisition costs are allowed in the ratebase as goodwill, these costs should be reviewed on a case-by-case basis).

represent monopoly rents.[154] Operators argue that we should allow full acquisition costs,[155] or at least provide operators an opportunity to overcome a presumptive disallowance.[156] They assert that Congress did not intend exclusion of these costs.[157] Several parties argue that unlike traditional utilities, cable includes a significant investment in intangibles.[158] COA argues

---

[154] See, e.g., California Cable Comments at 41-42; Cablevision Industries Comments at 18-21; Eagle Comments at 3; Georgia Cable Comments at 19; Time Warner Comments at 28. These parties assert that disallowance of acquisition costs would deprive the cable operator of the opportunity to earn a reasonable return on its investment. See also Medium Operators Comments at 8 (arguing that exclusion of these costs is appropriate only as such costs are defined as the amounts over the fair market value of a system, including the value of intangibles); California Cable Comments at 41-45 (using the term 'acquisition premium' rather than 'excess acquisition cost').

[155] See, e.g., Eagle Comments at 3.

[156] See, e.g., Cablevision Systems Comments at 25-26, 27-28. See also Continental Comments at 49-51 (in traditional utility regulation the presumption may be overcome by a showing that the transaction was at arm's length and benefited consumers); Arthur Andersen Comments at 31 (this approach is appropriate on a prospective basis); Small Systems Comments at 32-33 (to justify either current rates or a rate increase, the Commission should permit cable operators to include in the ratebase that portion of excess acquisition costs that would generate a return to the cable operator equivalent to any operating expenses that they would have been able to save subscribers through efficiencies related to the acquisition).

[157] See, e.g., NCTA Comments at 17; Small Systems Comments at 24, n.22; Summit Comments at 3; Time Warner Comments at 28; Cablevision Systems Comments at 20-22 (exclusion of excess acquisition costs thwarts Congressional intent because it will deny operators an opportunity to recover all costs, reducing the income-generating potential of these systems). See also Cablevision Industries Comments at 22-23 (exclusion of excess acquisition costs would constitute an unconstitutional taking, because operators were unaware of potential disallowance of these costs); accord, Cablevision Systems Comments at 18.

[158] See, e.g., COA Comments, White Paper Attachment at 25-26; Georgia Cable Comments at 22 (intangibles on a cable system's books were incurred through arm's length transactions in an unregulated environment, have been recorded in accordance with

that a company's intangible resources are often what separates the company from the competition, so these resources must have some future value.[159] COA also asserts that subscribership growth should be included in the ratebase,[160] and that goodwill should be included in the ratebase as a going-concern value.[161]

78. California urges the Commission to take further study to determine the value of the monopoly component of intangible assets, if any, and in the interim to permit a cable system to

---

GAAP, and meet the definition of an asset as a future economic benefit over which the entity can exercise control). See also Summit Comments at 4; California Cable Comments at 45 (intangible assets play a vital role in providing cable service, and their total value should be included in the ratebase regardless of the monopoly power of the operator).

[159] COA Comments at 31-36. Specifically, COA argues that the subscriber base at the time of acquisition has value that should be reflected in rates. COA recommends two different methods for estimating value: (1) determining revenue from these customers over the period they remain customers, to project the basic revenue that can be expected from an even base of subscribers, with these revenues discounted over a predefined number of years, yielding an estimate of value of existing subscriber base; and (2) estimating the costs per subscriber associated with building a valid subscriber base. COA urges that franchising operating rights also have value that should be considered in the ratebase. Id. at 36-37. COA recommends an approach for determining this value by considering the situation of an unbuilt start-up system whose only asset is a franchise operating right. A cash flow analysis could be constructed given a range of terminal values for the enterprise at the end of the franchise term and the costs associated with building a cable system from the ground up. The present value difference of these two cash flows would be the value of the franchise operating right.

[160] Id. at 37-40. This could be determined by assessments made at the time of sale by a hypothetical firm.

[161] Id. at 40. See also Comcast Comments at 31-35 (three types of intangibles have typically been identified with cable companies: subscriber lists, franchise value, and going-concern value); Georgia Cable Reply at 8 (Congress, in the Cable Act of 1984, required going concern value to be considered whenever a franchise authority acquires or effects a transfer of a cable system to a third party; this evidences Congressional intent that this amount should be included in the ratebase).

establish the value of these assets, net any monopoly component, using accepted valuation theory.[162] California and Summit argue that these costs should be included in the ratebase and should be eligible for amortization as part of system expenses.[163] TMC argues that at a minimum, and as a transition method, the Commission must allow intangibles to be amortized over the remaining life of the franchise.[164]

79. Other parties argue that the exclusion of excess acquisition costs from the ratebase is unconstitutional.[165] Some urge that a regulatory system that does not allow recovery of acquisition premiums will have a significant adverse impact on

---

[162] California Cable Comments at 38, 47, 53-55, 57 (intangible assets of a cable system are those nonphysical resources employed in the operation of the business that alone or in combination are expected to benefit future operations; only three criteria must be met to qualify as an intangible asset: (1) asset must be nonphysical; (2) it must be employed in the operation of the business in question; and (3) it must be expected to earn higher earnings for the business than would be expected without it).

[163] California Cable Comments at 57; Summit Comments at 4.

[164] TMC Comments at 13-14 (if the Commission disallows the value of intangibles from the ratebase and also excludes them as amortization expense, most cable operators will lack sufficient revenue to cover their obligations to lenders, local franchise authorities and the Commission).

[165] See, e.g., Cablevision Systems Comments at 22-26; Georgia Cable Comments at 22 (exclusion raises Fifth and Fourteenth Amendment issues); Small Systems Comments at 25-26; California Comments at 41; Viacom Comments at 26-27 (while it might be constitutional to disallow these costs for regulated entities, this is not the case here); Georgia Cable Comments at 23. See also Comcast Comments at 35-36. Comcast states that allowing these costs into ratebase may lead to higher rates. To remedy this situation, Comcast suggests that the Commission adopt a Z factor that can be added to the price cap increases over the recovery period. This Z factor represents an adjustment for the recovery of an adequate return on an operator's net investment in intangible and tangible assets which would not otherwise be allowed to be recovered under price cap rules.

the industry,[166] its financial structure, its ability to attract capital,[167] and the reasonableness of returns granted to investors in these acquiring companies.[168] Many cable operators point out that competitive firms and regulated industries are routinely purchased at significant multiples of book value, and that this does not necessarily reflect monopoly rents.[169]

80. Further, these parties argue, purchases that occurred prior to regulation do not raise traditional concerns warranting disallowance of excess acquisition costs;[170] the arms-length

---

[166] See, e.g., California Cable Comments at 42-43; Cablevision Industries Comments at 22-24 (disallowance of excess acquisition costs will harm subscribers, because they will be denied improvements in the quality and quantity of service they receive); Cablevision Systems Comments at 18; NCTA Comments at 13; TMC Comments at 13.

[167] See, e.g., Eagle Comments at 3; Georgia Cable Comments at 20-21 (operators expected a return on total investment when they invested in systems).

[168] COA Comments at 28. See also Small Cable Reply at 23-25 (exclusion of all intangible assets associated with acquired systems has two flaws: (1) it ignores the reality that an ongoing business has greater value than mere replacement cost of its tangible assets; and (2) many small cable operators have not earned monopoly profits).

[169] See, e.g., COA Comments at 24-26, White Paper Attachment at 15-17, 27-30 and 38-48; Continental Comments at 35-39. NCTA points to the Commission's first rate survey in an attempt to demonstrate that cable rates do not necessarily contain monopoly profits because there was no difference in rates charged by competitive and noncompetitive systems. NCTA Comments at 9 and Attachment. See also Georgia Cable Comments at 22 (for excess acquisition costs incurred prior to regulation, the Commission should at least permit acquisition adjustments such as those that have been allowed when property is transferred between utilities); Summit Comments at 3 (cable operators should be allowed to step up assets to market value, as allowed by the Internal Revenue Service); CATA Comments at 16 (to the extent that acquisition costs are within a system's current market value, they should be recoverable in ratebase).

[170] See, e.g., Viacom Comments at 21-25 (cable operators who purchased systems in arm's length negotiations prior to regulation had no reason to doubt that their purchase price was based upon prevailing market values); Cablevision Industries

purchase price of these systems should be accepted as a fair measure of the value of the system's assets.[171] Some cable operators also assert that systems should be valued at the time the assets were first dedicated to public use, which they contend is when regulation was imposed under the Cable Act of 1992.[172] They assert that if the Commission decides to exclude excess acquisition costs, it should do so only on a going-forward basis.[173]

81. Several cable operators argue for amortization of excess acquisition costs and intangibles as annual expenses, although they propose different amortization periods.[174] Other parties, including some local governments, argue that if excess acquisition costs other than goodwill are included in the ratebase, they should be amortized over a period of at least fifteen years, which will produce the lowest subscriber rates

---

Comments at 18-21; Cablevision Systems Comments at 10-11; COA Comments at 46-48; Georgia Cable Comments at 19-20; Medium Operators Comments at 17 and Ernst & Young Study. In fact, many operators argue that the fact that the cable system acquisition price exceeded net book value of plant in service does not necessarily reflect monopoly profits, but may be attributed to the seller's needs to: recapture start-up losses; realize the deferred returns on invested capital; and recover depreciation and interest expenses. See, e.g., Cablevision Systems Comments at 10-11, 19; COA Comments at 27-28; California Cable Comments at 42, 49; Time Warner Comments at 30; Continental Reply at 3.

[171] See Continental Comments at 49-51; Viacom Comments at 21-24.

[172] See, e.g., Viacom Comments at 19.

[173] See, e.g., Cablevision Systems Comments at 27; CATA Comments at 16 and Attachment at 24 (past legal conduct should not be penalized now); Viacom Comments at 24 (at least for this transitional period, the Commission should recognize excess acquisition costs as valid, and allow them in the ratebase).

[174] See, e.g., Medium Operators Comments at 5; Prime Cable Comments at 11 (the "useful life of the cable plant's tangible assets, i.e., 12 years"); Summit Comments at 4 (the fifteen-year period required by tax law); TMC Comments at 14 (the life of the franchise); New York Comments at 6 (as an annual expense amortized over a period of shorter than forty years). The latter argument is discussed in the section on Expenses, infra.

possible.[175] Some parties are opposed to any amortization of excess acquisition costs.[176]

iii. Discussion

1) Introduction

82. In instances where there is a lack of effective competition, as in the period prior to the adoption of the Cable Act, we find that acquisition prices are likely to include amounts paid in expectation of supracompetitive profits, growth premiums for unregulated services, and, quite possibly, simple overpayments. Traditional principles of ratemaking and the policies embodied in the Cable Act also warrant disallowance of costs that do not represent reasonable costs of providing regulated services to customers, equivalent to the costs that would be incurred under competition. This generally includes acquisition costs recorded as goodwill. Disallowance of these costs, contrary to some parties' assertions, is not a penalty but part of the normal and proper balancing of the interests of investors and ratepayers.

83. We also believe, however, that operators are correct in pointing out that some intangible costs do represent costs of providing service that are legitimately included in the operator's ratebase or revenue requirement. This is true whether the operator is an original owner or a purchaser of an established system. We refer to our Part 32 rules, which allow telephone companies to recover intangible costs related to "organizing and incorporating the company, original costs of franchise rights, patent rights, and other intangible property having a life of more than one year."[177] These costs produce assets that provide benefits to subscribers and are thus reasonably recoverable from subscribers. As we discuss below, in some cases, intangible costs may be included in the ratebase; in other cases, they may be treated as an expense, and amortized over a period of years.

84. To balance investors' and ratepayers' interests fairly, we will presumptively allow those types of intangible costs that generally represent reasonable costs of providing service and

---

[175] Michigan Comments at 15; Utah Comments at 15.

[176] Bell Atlantic Comments at 25 and Appendix at 19; ETC Comments at 4 (if amortization is allowed, the period should be forty years).

[177] 47 C.F.R. § 32.2690.

that would be incurred under competition. We believe that some intangible costs do generally represent costs used and useful in the provision of regulated services, and thus should properly be recovered in rates. Other intangible costs, including goodwill, will be presumptively excluded.[178] Herein, we discuss which costs should be presumptively included, and which should be presumptively excluded, and the manner in which these costs should be treated in ratemaking.

2) Intangible Costs Presumed To Be Includible In Rates

85. In this section we discuss the specific categories of costs that we conclude should be presumptively includible, and how those costs should be treated in ratemaking.

86. Organizational Costs. Organizational costs typically consist of the cost of organizing and incorporating the company.[179] They will ordinarily have been incurred by the entity originally providing cable service in the franchise area in

---

[178] We acknowledge the possibility that disallowance of any excess acquisition costs could have an adverse impact on the cable industry. We believe that the presumption of allowance of certain of these costs, in combination with the fact that an operator can still rebut the presumption of disallowance under set standards, will allow into ratebase the used and useful and prudently invested costs of providing regulated cable service, thus limiting the adverse effect. As we stated in our Docket 19129 Reconsideration Order:

> [R]egulatory bodies have long recognized that acquisition by one utility of the property of another utility presents the possibility for abuse, or at least confuses the question of the proper value to be placed on such property for ratemaking purposes. For this reason, inclusion of such amounts must be determined on a cast-by-case basis and in this connection, it is reasonable to require the acquiring carrier to show how the public who is to be charged a return on investment will benefit from the acquisition and, particularly that the price paid for property accurately reflects its value.

American Telephone and Telegraph Co., 67 F.C.C.2d 1429, 1439 (1978) (Docket 19129 Reconsideration Order).

[179] See 47 C.F.R. § 32.2690. We presumptively disallow from this category stock given to the organizer the value of which is in excess of reasonable salary.

question. These organizational costs should represent costs that benefit ratepayers, in that they must necessarily be incurred for the entity to be able to provide service. For that reason, we conclude that we should presumptively allow these costs into the ratebase to the extent they are prudently invested and are useful in the provision of regulated cable service. Operators will be allowed to continue to recover their capitalized organizational costs based on GAAP through amortization over a reasonable period, subject to scrutiny by the appropriate regulatory authority as to the reasonableness of rates produced by the recovery period.[180]

87. Franchise Costs. The original costs of government franchises are often allowed into the ratebase under traditional cost-of-service principles, because they must necessarily be incurred for the entity to be able to provide service.[181] We conclude that we should allow the original costs associated with a government franchise into ratebase if they: (1) are associated with the costs of winning the franchise; and (2) in the case of purchased systems, are costs that were directly borne by the seller. We conclude that we should presumptively allow these costs to the extent they are prudently invested and are useful in the provision of regulated cable service. Operators will be allowed to continue to recover their capitalized franchise rights based on GAAP through amortization over a reasonable period, subject to scrutiny by the appropriate regulatory authority as to the reasonableness of rates produced by the recovery period.

88. Customer Lists. Customer lists, too, are presumptively allowed into ratebase, to the extent that they reflect costs capitalized during prematurity, as defined by FASB 51, and are prudently invested and are useful in the provision of regulated cable service. Operators will be allowed to continue to recover these costs through amortization over a reasonable period based on GAAP, subject to scrutiny by the appropriate regulatory authority as to the reasonableness of rates produced by the recovery period.

---

[180] We note that it is not necessarily the case that the time period until renewal of a franchise is the appropriate capitalization period for organizational costs, because we believe there is an expectation of franchise renewal. Proponents of some period other than the franchise period should support their proposal.

[181] See 47 C.F.R. § 32.2690.

3) Intangible Costs Presumed To Be Excluded From Rates

89. Acquisition Costs. The issue of whether the acquisition costs of cable systems should be considered or accepted for computing ratebases and revenue requirements overlaps to a degree with the question of the plant valuation method that should apply. But the two matters are distinct, especially under the particular circumstances presented by the reimposition of cable service rate regulation by the Cable Act of 1992. Regardless of the valuation method that might be applied now and in the future, the issue cable operators raise is whether the cost-of-service methodology we apply should recognize the prices paid for cable systems in the past, especially during the period when systems were unregulated.

90. The issue is one of some importance and controversy, for both operators and customers, because many cable systems changed hands during the years when cable service was essentially unregulated, and in many cases the prices paid exceeded the original cost or the book value of the purchased cable system's tangible assets. These costs to the buyer, which we have termed excess acquisition costs,[182] were presumably recorded as goodwill. In arguing for recognition of acquisition costs for computing costs of service, the cable operators claim, variously, that the price paid is either a measure of the fair value of the system, or the proper valuation for assets brought into regulation, or a proper exception to the usual valuation rules to recognize the need for a transition tailored to the characteristics of the cable industry, or a constitutional requirement to prevent confiscation.

91. We continue to believe that the prices paid for cable systems, especially during the period when those systems possessed market power, are not a reliable or reasonable basis for ratemaking, and that their use is not required or supported by public utility practice, the purposes of the Cable Act of 1992, or the Constitution. It appears certain that those prices often include some expectation of supra-competitive profits that the market power of cable systems operating in a less than fully competitive environment could expect to generate. The magnitude of this expectation probably varied over time, increased by the growing list of cable channels that could be obtained only by subscribing to cable service, and discounted by the investors' assessment of the risks of competitive entry and re-regulation.

---

[182] Notice at n.40; see also Ratebase Order and Illinois Bell (discussing plant acquisition adjustments in the telco context).

But buyers and sellers negotiating acquisition prices clearly took into account the competitive status of cable systems and their consequent market power. Individual investors purchasing shares in cable companies no doubt also included this factor. The analysis we conducted as part of our development of governing rates set under the benchmark approach strongly supports this conclusion. The study submitted in support of the use of acquisition prices by Viacom, one of the largest cable operators, also recognizes the possibility that capitalized monopoly profits were included in those prices, though it suggests a smaller effect.[183]

92. It is also quite likely that acquisition prices included assessments of the profits that might be gained from emerging cable services that remain unregulated but could be expected to experience more rapid growth and penetration than those services that were made subject to regulation. Premium services such as HBO and Showtime, pay-per-view services, interactive services such as home shopping, and other offerings all represent newer sources of profit with greater potential for expansion. System prices can reasonably be expected to include the potential earnings for these actual and planned offerings. Moreover, it is certainly possible that even arm's-length transactions resulted in prices that were simply too high, transactions based upon overly optimistic projections of growth, the direction of the economy, and the buyer's ability to reduce operating costs or increase the value to customers.[184] Acceptance of these prices as a fair measure of the value of the facilities used to provide regulated services would require customers for those services to act as guarantors of the recovery of those prices, regardless of how inflated they might have been.

93. Traditionally, such excess acquisition costs have been partly or wholly excluded from the ratebase of regulated concerns, because these costs are seen as inappropriate costs for

---

[183] The Kolbe/Vitka Study estimates, based upon stock price movements of publicly traded cable companies that capitalized monopoly profits are likely to represent less than 10 per cent of the pre-regulation value of cable companies' assets. Viacom Comments, Appendix at 2, 18-27.

[184] See, e.g., COA Comments at 42 ("There are certainly examples of cable purchasers who paid too much. Similarly, there are some operators who purchased properties and raised rates without improving service, merely to cover the cost of debt service.").

ratepayers to bear.[185] This is because these costs typically benefit the seller, not the ratepayer; they do not contribute to the plant supporting regulated service. We also note that disallowance of goodwill for monopoly cable systems is consistent with findings of the United States Tax Court.[186] We believe that disallowing acquisition costs, to the extent they include captialized supra-competitive profits, is consistent with, if not indeed compelled by, the theory and purposes of the Cable Act of 1992. The Act does not instruct us to consider acquisition costs or the prices individual shareholders paid for cable companies before the adoption of the Act. The language and legislative history of the Cable Act of 1992 demonstrate a primary concern with preventing the undue market power of cable operators subject to neither regulation nor effective competition from setting supra-competitive rates.[187] Allowance of the acquisition price of cable systems as part of the costs of service would present a substantial probability, in our view, of passing on to customers costs that reflect neither the costs of providing service nor the costs that would be incurred under competition.

94. We also find unpersuasive arguments that acquisition costs should be accepted because they represent the arm's-length purchase prices of assets. While the market price paid for assets may be presumed to be an appropriate measure of the original cost in many regulatory contexts, for example because it is likely to represent the value of the asset to ratepayers at the time the utility begins using the asset to provide service, that is not the case here. As we discussed above, the acquisition prices paid prior to the Cable Act of 1992 are likely to be inflated in various ways, notably by the expectation of supra-competitive profits. Because of this, it is not reasonable or fair to ratepayers to include those prices presumptively or automatically in the ratebase.

95. Moreover, we also do not believe that the acquisition price should be accepted as representing the value of the assets at the time the system was dedicated to the public service, or

---

[185] E.g., 47 C.F.R. §§ 32.2005, 32.2007; San Diego Land & Town Co. v. National City, 174 U.S. 739, 757-758 (1899); Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 454 (1913).

[186] Tele-Communications, Inc. v. Commissioner of Internal Revenue, 95 T.C. No. 36 (1990).

[187] S. Conf. Report No. 102-92, 102d Cong., 1st Sess. 8-11 (1991). We note that the record contains arguments both supporting and contradicting the view that cable rates reflect anticipation of supra-competitive earnings.

that, even if this were the case, the acquisition price should be accepted for ratemaking. Cable systems were providing service to the public prior to the reimposition of regulation under the Cable Act of 1992, and generally were subject to local franchises. The reimposition of regulation recognized the existence of their market power, and sought to restrain it. Allowing into the ratebase prices that reflect and capitalize that market power would effectively perpetuate that market power rather than, as the Cable Act of 1992 plainly intended, protect customers from it.

96. An alternative approach, which we set for comment in the Notice and which is urged by some commenters, is not to use the acquisition price as a measure of value for setting the ratebase, but to permit excess acquisition costs to be recovered through amortization over a period of years. This approach would reduce the amount that customers would be liable to pay in order to compensate operators for their acquisition costs by not permitting operators to earn a return on such costs, but would still permit operators to recover all such costs. The comments also propose other mechanisms that would effectively permit acquisition costs or the debt service costs associated with acquisition costs to be recovered from ratepayers.[188]

97. Commenters favoring some form of recovery argue that acquisition costs should be allowed in fairness to buyers who could not have expected that rate regulation would be imposed, or that denial of full acquisition costs will impede the ability of the cable industry to obtain financing to improve its facilities and programming offerings. We conclude, nonetheless, that inclusion of acquisition costs that do not provide value to subscribers would undercut the purposes of the Cable Act of 1992 and unnecessarily favors operators over subscribers, by requiring subscribers to pay rates above the levels of the costs actually and reasonably applied to provide regulated service, and above the costs that would likely be incurred under competition. We thus reject the various approaches suggested to include

---

[188] See, e.g., Comcast Comments at 36 (proposing a Z factor adjustment to the price cap to permit the recovery of and an adequate return on an operator's net investment in tangible and intangible assets which would not otherwise be recovered under the price cap rules); Georgia Cable Comments, Appendix A (proposing a marginal cash flow test that would find rates not unreasonable so long as the ratio of operating cash flow from all cable services to the sum of debt service plus capital expenditures does not exceed 1.20:1).

acquisition costs in the ratebase.[189] As we discuss above, allowing operators to claim categories of intangible costs that do in fact represent reasonable costs of providing service that benefit subscribers, while not permitting supra-competitive and other unreasonable costs from being imposed on subscribers, is fair to operators and investors and to consumers.

98. Operating Efficiencies. There may be sales, as some commenters claim, that benefit subscribers by generating operating efficiencies that are unobtainable by the seller. We believe it is appropriate to consider whether these efficiency gains warrant inclusion of some part of goodwill in the rate calculation. However, in any such case, the operator must clearly rebut the presumption against including goodwill by demonstrating the nature and value of the net efficiency gains and, most importantly, that these gains resulted in concrete, tangible benefits to subscribers, especially in the form of better and more varied regulated services. Efficiency gains that permitted the buyer to improve its margins but did not benefit subscribers would not lay the foundation for allowing goodwill to be included in the rates subscribers pay.

99. Rebuttal of Presumption. In summary, we define goodwill as the portion of plant purchase price that cannot be assigned specifically to identifiable property acquired and that is not recorded on the operators books of account as accumulated losses, subscriber lists, franchise rights, patent rights or organizational costs. We conclude that goodwill, including

---

[189] This includes Arthur Andersen's transitional excess acquisition cost approach. See Arthur Andersen Comments at 26-31. Arthur Andersen justifies its approach as a pragmatic alternative. Although Arthur Andersen offers numerous conditions designed to tailor these calculations to the particular circumstances of the operator, there is no rationale as to why the amount of excess acquisition adjustment that would be recovered from subscribers under this proposal represents a fair balancing of the interests of subscribers and operators. For example, Arthur Andersen proposes that an operator could demonstrate that its investment was prudent by showing that the price paid per subscriber was reasonable in relationship to prices paid by other operators during the same time period for systems with similar attributes. This test of prudent investment fails to address our concern that the ever higher prices paid per subscriber that typified transactions in the period before regulation represented the capitalization of progressively greater supracompetitive earnings expectations, and must accordingly be excluded from ratebase calculations.

going-concern value,[190] should be presumptively disallowed from the ratebase because it is likely to represent expectations of supra-competitive profits and other outlays that should not be borne by regulated service customers. We believe this approach fairly balances the interests of consumers and investors. Operators wishing to overcome this presumption should demonstrate that allowance of these costs would result in reasonable rates, that the costs were the result of an arm's-length transaction,[191] and that the goodwill has produced for subscribers concrete benefits that would not have been realized otherwise. In reviewing such showings, the franchising authority or this Commission will scrutinize the extent to which inclusion of these costs will produce rates above competitive levels. To the extent that they do, the operator will need to demonstrate why its particular situation justifies inclusion in the ratebase of these costs.[192]

---

[190] We disagree with Georgia Cable that the Communications Act evidences Congress' intent that we should allow going-value concern into ratebase. Section 607 of the Communications Act was adopted in 1984, and does not necessarily evidence congressional intent that in structuring our cost-of-service regulations, we shall presumptively allow going-value concern into ratebase. Additionally, operators, to the extent that they can meet the tests enunciated in this section, can overcome any presumption of disallowance.

[191] Courts have consistently allowed regulatory authorities to exclude goodwill from determination of ratebase. See, e.g., Gavelston Electric Co. v. Gavelston, 258 U.S. 388, 396-397 (1922); Willcox v. Consolidated Gas Co., 212 U.S. 19, 52 (1909); Tele-Prompted Cable Communications Corp. v. N.J. Public Utility Commissioners, 154 N.J. Sup. 1, 380 A.2d 114 (1977) (goodwill is inappropriate in determining ratebase).

[192] To the extent that the operator seeks to justify rates above competitive levels based on inclusion of goodwill, there is a heavy presumption against inclusion of these costs. The Commission has traditionally placed the burden on telephone companies to justify inclusion of the amounts claimed as plant acquisition adjustments. See Ratebase Order and Illinois Bell. Operators making such a showing will be required to show the nature of each cost they are seeking to justify for inclusion in the ratebase, and should provide all pertinent data relating to the acquisition. At a minimum, this includes the purchase price of plant, its book value, a description of plant, the effect on subscribers, the results of a valuation study, and the results of any request for franchise approval.

100. Constitutional Issues. As we have discussed, in this Order we are substantially broadening the list of intangibles that may be included in rates by cable operators beyond those proposed in the Notice. Even intangible costs such as goodwill are only presumptively disallowed; upon a proper showing that rebuts the presumption and demonstrates that the cost does meet the tests of benefit to subscribers and rates that are not above competitive levels, the costs will be allowed. We believe that this approach assures that our treatment of acquisition costs does not impair the constitutional rights of cable operators; instead, it fairly balances the rights and interests of investors and customers. Moreover, as we explain later in this Order, we are providing for hardship showings by operators who claim that neither the benchmark/price cap nor the normal cost-of-service approach permits them the opportunity to set rates that permit them to attract capital. These procedures fully protect operators' constitutional rights.[193]

4. Plant Under Construction

i. Notice

101. In the Notice the Commission solicited comment on whether we should impose any limits on inclusion of plant under construction in the ratebase.[194] We requested comment on what practices the cable industry currently follows in accounting for plant under construction. Further, the Commission sought comment on whether it should apply the traditional rule under ratebase/rate of return regulation, that plant under construction will be withheld from the ratebase until it meets the used and useful test, but that interest during construction can be capitalized.

ii. Comments

102. Several parties argue that plant under construction should not be allowed in the ratebase, absent a showing of severe financial distress, until it is used and useful.[195] Michigan and

---

[193] As the courts have made clear, "the FCC has no obligation to maintain the current market value of investors' property." Illinois Bell v. FCC, 988 F.2d at 1262; accord Hope, 320 U.S. at 601; Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1175 (D.C. Cir. 1988).

[194] Notice at ¶ 42.

[195] See, e.g., Michigan Comments at 15; Utah Comments at 15; Municipals Comments at 23; Seaford Comments at 11; ETC Comments at 4 (plant under construction should not be allowed in

Utah argue that any interest paid during construction could be capitalized during construction, thereby providing the operator some benefit during the construction period.[196] Georgia Cable asserts that this is not a real issue,[197] while New York requests that we allow franchising authorities to examine whether construction costs, or a portion thereof, might properly be included in the ratebase prior to completion.[198]

103. Several cable operators argue that plant under construction should be included in the ratebase, arguing that its exclusion would make financing impossible and might endanger the financial integrity of some cable operators.[199] Continental asserts that exclusion of plant under construction from the ratebase will produce a disincentive to improve technology and service.[200] Continental suggests that the appropriate method for

---

ratebase because: (1) it is not used and useful; (2) inclusion may result in over-construction and imprudent investment; and (3) inclusion requires a ratepayer to pay return on investment used by future ratepayers. Instead, accrue cost of service capital incurred during construction; upon completion, if the facility is deemed used and useful, the investment, along with the accrued cost of service, can be included in ratebase).

[196] Michigan Comments at 15; Utah Comments at 15; see also NYS Commission Comments at 7.

[197] Georgia Cable Comments at 25 (cable systems rarely have plant that sits idle for very long, so whether or not to include plant under construction in ratebase is largely a non-issue).

[198] NYS Commission Comments at 7.

[199] See, e.g., CATA Comments at 15-16 (the cable industry's requirements that it grow, rebuild to accommodate technological change, and provide new services compel operators that do not sell stock to take out loans; because the operator needs to show an ability to begin repaying principal and interest from system revenues immediately, these capital costs of service must be included before the used and useful point or it will oftentimes be impossible to obtain financing); NCTA Comments at 18 (urging the Commission to study the issue of plant under construction and the interest recovery approach further before adopting a method); TMC Comments at 15.

[200] Continental Reply at 10 (not permitting any return until an entire system is rebuilt and all subscribers switch over to the new system would also result in the accumulation of losses). Continental uses the term "construction work in progress (CWIP),"

including plant under construction in the ratebase requires an adjustment to the historical test year to add into ratebase: (1) plant under construction during the years in which activation is scheduled; (2) known and measurable increases in plant under construction; (3) interest during construction; and (4) capitalized marketing costs associated with the rebuild.[201] Continental argues that to the extent that plant under construction is not allowed in the ratebase, cost of service showings will proliferate, capital management will become more problematic due to regulatory delays, and the ratebase will need to be further adjusted by interest during construction.[202]

iii. Discussion

104. In the Notice we proposed two options for valuating plant under construction for ratebase purposes, the capitalization method and the revenue requirement offset method.[203] The capitalization method is the traditional method for considering plant under construction. Under this approach, plant under construction is excluded from the ratebase, but the operator calculates an allowance for funds used during construction (AFUDC) and includes this allowance in the cost of construction. As construction is completed and the plant is placed into service, the cost of construction (including AFUDC) is included in the ratebase and recovered through depreciation.[204]

105. Under the revenue requirement offset method, plant under construction is included in the ratebase, and AFUDC is treated as part of the cost of construction. Because plant under construction is included in the ratebase, the amount of AFUDC capitalized is included in income for ratemaking purposes. This serves to offset the revenue requirement determination for the development of rates for services. Both of these methods meet

---

which is apparently equivalent to "plant under construction," the term we use here.

[201] Continental Reply at 12. Alternatively, Continental proposes that the Commission could include CWIP, whether actually incurred or anticipated, in ratebase when plant becomes used and useful. At this point, the historical test year could be adjusted as described under the first approach.

[202] Id.

[203] Notice at ¶ 42.

[204] Under GAAP, AFUDC is accrued at a rate based on the actual cost of debt.

GAAP requirements.[205]

106. We are adopting the capitalization method to govern ratemaking treatment of plant under construction. This method has been used by various regulatory authorities to provide reasonable rates for utilities.[206] Further, this method will allow operators to recover interest from the construction period only after the plant is placed in service.[207] We believe that "it is in the public interest that investors receive a reasonable compensation on the funds they have provided to finance construction projects which will, when placed into service, benefit future ratepayers."[208] AFUDC will be allowed only to the extent the related costs are not already included in start-up losses.

107. Cable operators express concern that construction loans may require the operator to have more up-front capital in order to begin repaying its debt. We believe that these concerns are overstated. As portions of plant move into service, they become used and useful, and so the cost of those portions can be

---

[205] We believe that by relying on GAAP, we can avoid requiring cable operators to comply with additional accounting requirements in this regard. Under the Cable Act of 1992, the Commission has a statutory mandate to minimize administrative burdens in fashioning regulations. 47 U.S.C. §543(b)(2)(A) and (B).

[206] See 47 C.F.R. § 32.2003. We acknowledge that for telephone rate regulation we are considering switching from the capitalization method to the revenue requirement offset method. See Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC), 8 FCC Rcd 2084 (1993). This proposed method also conforms with the requirements of GAAP. However, no decision has yet been made in that proceeding, and the more prudent course for cable regulation, at least on an interim basis, is for the Commission to use a method with which we have experience, and which we and other regulators of utilities have used and continue to use with success.

[207] Interest should be computed at prime rate or at the operator's demonstrated cost of the funds used for the construction.

[208] American Telephone and Telegraph Co., 64 F.C.C.2d 1, 60 (1977).

entered into the ratebase.[209] This approach has provided adequate recovery in the telephone area, and we believe that it will do so here.[210]

5. Cash Working Capital

i. Notice

108. In the Notice we proposed to allow operators to include in their ratebases a working capital allowance.[211] We solicited comment on several different approaches for determining the allowable amount, and stated that any of these methods could produce a negative or positive allowance, depending on operating characteristics.[212]

ii. Comments

109. Cable operators commenting on this issue generally favor inclusion of a working capital allowance,[213] but differ on

---

[209] Thus, Continental's concern that the capitalization method would prevent return on any construction until all is completed, is unfounded. See Continental Reply Comments at 10. We see no need to adopt Continental's elaborate alternative of gradually including CWIP into ratebase based on a hypothetical construction schedule rather than on the actual commitment of funds to construction.

[210] We note that operators are free, under standards enunciated in this Order, to request, and demonstrate the need for, recovery beyond what is outlined in either the benchmark or cost of service approach. See part X., Hardship Showing, infra.

[211] Notice at ¶¶ 44-45. This allowance would provide a return on the funding provided by investors to support regulated operations between the time the operator pays its creditors and the time it receives payment from its customers.

[212] Id. We proposed that we might: (1) establish an industry-wide allowance; (2) require a balance sheet methodology whereby the allowance is the average difference between current assets and current liabilities; or (3) require operators to study the timing of operating revenues and disbursement flows, known as a lead-lag study.

[213] See, e.g., NCTA Comments at 17; TMC Comments at 16; Eagle Comments at 3-4.

the preferable methodology.[214] Local governments, however, favor the use of lead/lag studies, in the expectation that they would provide more accurate results.[215] Other commenters support use of the balance sheet approach (current assets - current liabilities) as an appropriate method.[216]

iii. Discussion

110. Traditionally, we have included in the ratebase of telephone companies a cash working capital allowance based on an estimate of the average amount of investor-supplied capital used to finance operations from the time that services are provided to the time that revenues are collected.[217] In that context, we have

---

[214] See, e.g., NCTA Comments at 17 (operators should not be required to perform lead/lag studies because they are too burdensome); COA Comments at 69-72; Continental Comments at 56; Eagle Comments at 3-4 (all favoring a formula methodology, which would provide a fair allowance without being burdensome); TMC Comments at 16 (the Commission should establish an industry-wide capital allowance for all operators); Eagle Comments at 3-4 (a return should be allowed on working capital assets because some companies maintain an unclassified balance sheet, and they will not readily be able to make the necessary determinations).

[215] Austin Comments at 12; Michigan Comments at 16; Municipals Comments at 24; Seaford Comments at 12; Utah Comments at 16. Municipals and Seaford also state that in the absence of the lead/lag study, the working capital allowance should be zero, since cable operations provide adequate cash flows to fund operations. Accord, New Jersey Comments at 8 (operators bill a month in advance and so have funds available; thus there should be no cash working capital allowance).

[216] ETC Comments at 5; BellSouth Comments at 17-18 (the balance sheet approach is the least burdensome, and will produce approximately the same results as lead/lag studies). See also Small Operators Reply at 25-26 (small operators should have the option to use this method or a standard industry-wide allowance set by the FCC; they do not have the resources to perform lead/lag studies).

[217] See 47 C.R.F. § 65.820(d). This recognizes that where the receipt of revenues "lags" with respect to the outlay of cash for expenses, investors incur a cost for providing funds for the day-to-day operations. Receipts "lead" outlays where subscribers are billed in advance and ratebase would be reduced by the average amount of this subscriber supplied capital (i.e., a negative cash working capital allowance).

approved several methods for determining the cash working capital allowance: lead-lag studies; a simplified formula method;[218] and a standard allowance method.[219] We have considered many factors regarding the telephone industry, and have recognized that, in that context, any one of several estimation methods will produce a reasonable cash working capital allowance.

111. The record indicates that cable subscribers are generally billed in advance for regulated cable services, and billed in arrears for nonregulated services such as pay-per-view.[220] Cable operators generally pay vendors, employees, and taxing authorities in arrears. Given these circumstances, we are adopting a presumption that a zero allowance is needed to support the regulated cable services.[221] We note that it is possible, where receipts lead outlays, to establish a negative cash working capital allowance. We believe that our zero presumption is appropriate, however, in that it takes account of the characteristics of regulated cable service provision, is fair to both operators and subscribers, and furthers the goals established by the Cable Act of 1992.

6. Other Costs - Excess Capacity, Cost Overruns, and Premature Abandonments

i. Notice

112. In the Notice the Commission sought comment on whether we should disallow from the ratebase costs that represent excess capacity, cost overruns, and premature abandonments.[222] We solicited comment on whether we should establish regulatory limitations or whether we can monitor industry practices and

---

[218] The Commission-approved Simplified Formula Method is set forth in Section 65.820(e) of our rules, 47 C.F.R. § 65.820(e). It provides a methodology which is conceptually similar to the lead-lag study but does not require the same level of detail in attaining the factors for the CWC determination.

[219] See Ratebase Order, 3 FCC Rcd at 269.

[220] Telephone customers, on the other hand, are billed in arrears for long distance service, but may be billed in advance or in arrears for local service.

[221] An operator challenging this presumption must establish that its operations do not fit the industry mold, and that it requires the establishment of a cash working capital allowance.

[222] Notice at ¶ 43.

impose requirements later if necessary. We specifically sought comment on several ways that the Commission could treat excess capacity, cost overruns, and premature abandonments for ratebase purposes.[223]

ii. Comments

113. Several parties agree with the Commission's tentative conclusion that the costs of excess capacity, cost overruns, and premature abandonments should be excluded from the ratebase.[224] Michigan and Utah argue that these costs should be depreciated or amortized, which would allow operators to recover these costs over time, but not earn an annual return.[225] Austin argues that the burden should be on the operator to show that unused channel capacity or similar investments will enhance regulated services and that such investments were prudent.[226]

114. Several cable operators argue against exclusion of costs for excess capacity, cost overruns, and premature abandonments.[227] These parties argue that certain costs for expanding channel capacity remain the same for expansion of differing numbers of channels, and that it would therefore be imprudent not to expand to the largest number of channels at the same cost even where the additional channels' usage is not

---

[223] Id. at n.47. The options we proposed included: (1) permitting the entire cost to be included in ratebase; (2) excluding from the ratebase any costs that represent excess capacity, cost overruns and premature abandonments; and (3) as an intermediate approach, permitting depreciation or amortization of the costs of excess capacity, cost overruns and premature abandonments, but exclude them from the ratebase. We also solicited comment on the appropriate period of amortization if we permitted these costs, and on whether the return of capital should be defined to include both equity and debt capital or only debt expense. We tentatively concluded that it should include only debt expense.

[224] See, e.g., ETC Comments at 4; Michigan Comments at 15; Utah Comments at 15.

[225] Michigan Comments at 15-16; Utah Comments at 15-16.

[226] Austin Reply at 24.

[227] See, e.g., COA Comments at 67-68; Continental Comments at 54; NCTA Comments at 18.

immediately envisioned.[228] NCTA argues that the Commission should not disallow these costs if they were prudently incurred plant investments.[229] Summit suggests that GAAP and IRS guidelines should govern the treatment of excess capacity and cost overruns but fails to distinguish the cable industry from other regulated industries to justify the use of these guidelines.[230] NYS Commission states that it may be difficult to exclude the costs of excess capacity from ratebase because sometimes franchise authorities require operators to rebuild or upgrade systems to a certain size.[231]

115. BellSouth argues the middle ground that the exclusion of these costs from the ratebase should be dealt with on a case-by-case basis, with application of the used and useful and prudent investment standards to determine whether disallowance is appropriate in an individual case.[232] The Commission, BellSouth suggests, could then monitor industry practices in this regard and impose rules later, if necessary.

iii. Discussion

116. Excess capacity. We conclude that operators should be allowed to include in the ratebase any excess capacity that will be used within a twelve month period.[233] We believe it is prudent

---

[228] See, e.g., Continental Comments at 54; COA Comments at 67-68 (if the Commission wants to provide incentives for the development of new technology and investment, it would be inconsistent to disallow investment in channels presently held in reserve).

[229] NCTA Comments at 18. If the Commission does exclude these costs from ratebase, NCTA argues, the Commission should provide operators a higher rate of return reflecting increased risk.

[230] Summit Comments at 8.

[231] NYS Commission Comments at 7.

[232] BellSouth Comments at 17.

[233] As noted above with regard to start-up losses, we will allow recovery of these costs only to the extent that they are recorded on the company's books as such. The amortization of allowed costs must begin at the end of the prematurity phase of operation, and should generally be completed during the service life of the longest depreciable assets. We believe this will generally be no longer than fifteen years.

for a cable operator to expand capacity beyond immediate needs, when such a present-day investment saves subscribers future costs for additional labor and equipment. We also note that telephone regulation provides for a certain limited amount of excess capacity.[234] Nonetheless, we find that cable service regulation presents a different situation than telephone regulation; here, there is no annual or biannual filing, no opportunity to adjust the ratebase downward if excess capacity does not become used and useful within a certain period.

117. Further, our price cap adjustment and network upgrade plans make adequate provision for the addition of channels and capacity. Thus we will direct that any facilities that are not currently used and useful, but will be used and useful within one year, may be included in the ratebase, but that if they are included in the ratebase, they may not in any part be reflected in annual operating expenses or in any price cap adjustment. We believe this approach strikes a reasonable balance between the interests of cable operators and those of subscribers by allowing an operator to include in the ratebase costs that benefit subscribers now or will benefit them very soon, while assuring that no double or excessive recovery of costs, and no double payment for capacity, can occur.

118. Cost overruns. We believe that cable operators should be able to recover the costs of overruns that have occurred through no fault of the operator. At the same time, we must ensure that subscribers do not bear any burden for unnecessary, extravagant, or imprudent expenses that may constitute cost overruns. We therefore find that cost overruns should be presumptively disallowed from the ratebase, but that operators may overcome this presumption on a case-by-case basis by showing that the costs were prudently invested.[235]

119. Premature abandonments. We conclude that the cost of premature abandonments should be a recoverable operating expense rather than an element in the ratebase. In removing prematurely abandoned plant from the ratebase, a cable operator must bring plant to full recovery before retiring it.[236] To retire plant,

---

[234] See 47 C.F.R. § 32.2002.

[235] In making such a determination, we will examine whether the overrun was preventable, who was responsible for the overrun, and whether including the overrun in the ratebase will produce reasonable rates.

[236] Plant that has never entered into service cannot be retired and expensed, but is disallowed.

the operator must remove both plant and accumulated depreciation reserve from the balance sheet. Once the plant is retired, an operator may amortize the unrecovered investment (i.e., the original cost less accumulated depreciation) over a term equal to the remainder of the original expected life. This decision will protect subscribers by precluding recovery of a rate of return on abandoned plant, while preserving an opportunity for the cable operator to invest in more advanced technology. This approach allows the cable operator to recover the investment in outdated technology while not encouraging replacement of still useful equipment. Thus it helps achieve our goal of permitting operators to participate in the development of an advanced telecommunications infrastructure.

B. Expenses

1. Operating Expenses

i. Notice

120. In the Notice we proposed allowing cable operators to recover operating expenses as annual expenses incurred in providing cable service.[237] We tentatively concluded that plant-specific costs (e.g., maintenance), plant non-specific costs (e.g., programming expense, power, engineering and testing), customer operations (e.g., marketing, billing and collection), and corporate operations (e.g., legal, planning, accounting and finance) should be included as operating expenses that cable operators are entitled to recover in rates for regulated cable service. We tentatively prohibited recovery through regulated cable rates, of expenses unrelated to provision of regulated cable service.[238] In addition, we requested comment on whether other operating expenses should be recoverable, and on what costs should be treated as expenses in the year incurred, and what costs should be capitalized and depreciated over a number of

---

[237] Notice at ¶¶ 23-24. We also tentatively concluded that while programming expense would be a recoverable operating expense, it should not be a cost element in the ratebase. Id. at n.24.

[238] Specifically, we proposed to exclude lobbying expenses, contributions for charitable, social, or community welfare purposes, membership fees and dues in social, service and recreational or athletic clubs and organizations, and penalties and fines paid on account of violations of statutes and rules. Id. at n.25.

years.[239]

ii. Comments

121. Commenters, including cable operators, programmers, state and local governments, and telephone companies, agree that the enumerated categories of expenses should be treated as operating expenses and should be recoverable in rates for regulated cable service.[240]

122. Some commenters note that our rules already exclude costs unrelated to the provision of regulated cable service.[241] Some cable operators suggest other costs that should be treated as operating expenses.[242] For example, Cablevision Systems contends that the Commission has apparently excluded costs

---

[239] Id. at n.26.

[240] See, e.g., Medium Operators Comments at 15; Municipals Comments at 16; Connecticut Comments at 2. Section 79.924 applies to cable operators for which the basic service tier is regulated by local franchising authorities or the Commission or for which a complaint has been filed with the Commission regarding a cable programming service tier. The requirements of Section 79.924 are applicable in cost-of-service showings. Section 79.924(g) Unrelated Expenses and Revenues provides that

> Cable operators shall exclude from cost categories used to develop rates for the provision of regulated cable service, equipment, and leased commercial access, any direct or indirect expenses and revenues not related to the provision of such services. Common costs of providing regulated cable service, equipment, and leased commercial access and unrelated activities shall be allocated between them in accordance with subsection (f).

[241] Bell South Comments at 8, citing 47 C.F.R. § 79.924(g). See also TCI Comments at 32-33.

[242] Time Warner Comments at 22 (all reasonable expenses associated with the provision of regulated cable services, not just those enumerated in the Notice, are to be included and recovered). Time Warner argues that expenses related to regulated service, such as pole attachment fees, employee training, customer service, vehicle expenses, copyright fees, local origination, and all salaries and related benefits should clearly be included. See also TCI Comments at 32; Small Cities Comments at 21-22.

associated with system power, security, and quality assurances from operating expenses recoverable through rates for regulated services.[243] Medium Operators states that advertising costs associated with regulated programming services should be included as a recoverable operating expense.[244]

123. The exclusion of special expenses from recovery generated debate among commenters. Eagle agrees that special expenses should not be recoverable.[245] While not opposed to the exclusion generally, Small Systems states that such expenses are relatively small, and that most operators do not list them separately on their books.[246] BC states that any charitable contribution made in fulfillment of a franchise agreement or made to a local school or other governmental facility in the franchise area should be recoverable in basic service rates.[247] Continental similarly argues that charitable expenses, club fees, and other money expended in the franchise community should be allowed as necessary operating expenses.[248] Cablevision Systems agrees with the concept of excluding recovery of unrelated expenses, but believes that unrelated expenses and costs should be identified on a case-by-case basis.[249] State and local governments generally

---

[243] Cablevision Systems Comments at 40. Georgia Cable assumes that management fees are allowable expenses. Georgia Cable Comments at 12.

[244] Medium Operators Comments at 15-16. Medium Operators believes that operating expenses, excluding depreciation, amortization and income taxes, should be presumed reasonable as long as they are supported by audited financial statements.

[245] Eagle Comments at 2.

[246] Small Systems Comments at 3, n.3 (asserting that it would be administratively burdensome to separate out these expenses).

[247] BC Comments at 13.

[248] Continental Comments at 81-82; Georgia Cable Comments at 13; COA Reply at 34. But see NATOA Reply at 10-11 (lobbying costs, membership dues and charitable contributions are discretionary expenses made solely to advance the operator's business interests and boost its profits).

[249] Cablevision Systems Comments at 40.

support the exclusion of special expenses.[250] BellSouth believes that the Commission should permit a reasonable allocation of such costs to be recovered through rates for both cable operators and telephone companies.[251] Bell Atlantic supports exclusion of special expenses.[252]

124. Little comment was directed to which costs should be expensed and which should be capitalized. Small Systems suggests that all budgeted capital expenditures to be made within the following 12 month be included in the ratebase.[253] ETC argues that we should establish clear criteria for expenses that should be capitalized pursuant to IRS and GAAP guidelines.[254]

iii. Discussion

125. We will permit recovery of all operating expenses normally incurred by cable operators in the provision of regulated cable service. This will permit cable operators to recover fully the reasonable costs of providing regulated service, while protecting ratepayers from paying rates that reflect costs not reasonably associated with regulated services.

---

[250] See, e.g., Municipals Comments at 16; Seaford Comments at 9 (specifically arguing for exclusion of expenses associated with lobbying of elected officials); New Jersey Comments at 5.

[251] BellSouth Comments at 10. BellSouth believes, however, that if the Commission continues to exclude such costs from telephone service rates they should be excluded from rates for regulated cable services.

[252] Bell Atlantic Comments at 20-22. Bell Atlantic, advocating the same treatment for cable operators and telephone companies, argues for exclusion of all cable expenses related to lobbying and other items referred to in Section 32.7370 of the Commission's rules (47 C.F.R. § 32.7370). Bell Atlantic Comments at 22, n.45. Section 32.7370 is part of the Uniform System of Accounts for telephone companies and presumptively excludes special charges: lobbying; contributions for charitable, social or community welfare purposes; membership fees and dues in social, service or recreational or athletic clubs and organizations; penalties and fines paid on account of violations of statutes including fines paid for violations of U.S. statutes; and abandoned construction projects.

[253] Small Systems Comments at 17.

[254] ETC Comments at 6. Accord, BellSouth Comments at 10; Georgia Cable Comments at 12.

We affirm our decision to exclude from recovery those operating expenses and other costs unrelated to the provision of regulated cable service pursuant to our proposed cost accounting and cost allocation rules.[255] We note that the examples of operating expenses provided in the Notice were not meant as an exclusive list of the only types of operating expenses available for recovery. Other costs incurred in the provision of regulated cable service are recoverable if legitimate and reasonable.[256] The Commission and local franchising authorities will, however, review operating expenses in each cost showing to assure that they meet our cost standards. In this way we can ensure that a cable operator that elects to make a cost-of-service showing is able to recover all fair and reasonable costs incurred in serving its customers.

126. We also adopt our tentative conclusion that certain special expenses are presumptively excluded from recovery as not reasonably related to the provision of regulated cable services.[257] Cable ratepayers should not be responsible for reimbursing cable operators for unreasonable costs. We further conclude that, for the time being at least, GAAP should guide the determination of costs to be expensed and those that must be capitalized by each cable operator.[258]

2. Depreciation

i. Notice

127. In the Notice we tentatively concluded that the Commission should prescribe depreciation rates for purposes of developing cost-based rates for regulated cable service. We noted several different prescription methods and asked for comment on which was most suitable.[259] We also asked commenters

---

[255] See 47 C.F.R. § 76.924(f) and (g).

[256] See, e.g., our adoption of a programming mark-up, in our companion Benchmark Order at III.B.3.

[257] See 47 C.F.R. § 76.924(f) and (g).

[258] We note that the proposed uniform accounting system contained in Attachment C provides detailed instructions on how cable operators are to determine costs that are to be expensed and costs that are to be capitalized.

[259] Notice at ¶ 27. We noted that the prescription could be an industry-wide depreciation rate, a band of reasonable rates, or individual rates for each plant category. Cable operators

to address the necessary number of depreciable plant categories, evidence that should be taken into account in setting rates, and whether we should prescribe recovery on a straight line remaining life basis or use some other methodology. We tentatively concluded that depreciation rates should be based on book value of the asset as opposed to its economic or fair market value.

128. In addition, we tentatively concluded that any depreciation rates we prescribe should be designed accurately to reflect, and recover, the costs of the asset over its useful life.[260] We requested comment on what the impact on cable rates would be if we prescribed, for the purpose of a cost-of-service showing, depreciation schedules designed to allow recovery of capitalized costs over the maximum reasonable expected life of the plant. We sought comment on a number of current industry depreciation practices, and on the useful life and salvage value of all categories of facilities used by cable operators to provide regulated cable service. Finally, as an alternative to prescription of depreciation rates, we asked whether we should for the time being only monitor operator depreciation practices.

ii. Comments

129. Most cable operators oppose our tentative conclusion, or argue for deferral of consideration of this issue. Cablevision Industries states that treatment of depreciation for ratemaking purposes poses a challenge due to the many changes affecting the cable industry.[261] Other cable operators argue that the Commission should defer consideration of depreciation rules to a later time or a second phase of this proceeding.[262]

---

could be required to use company-wide expense as reported in Securities and Exchange Commission ("SEC") financial statements. Alternatively, we could link depreciation to specific circumstances in each franchise or adopt some other standard.

[260] Id. at ¶¶ 28-29.

[261] Cablevision Industries Comments at 44 (recommending that we establish uniform standards governing depreciation while allowing operators a degree of flexibility in applying them in individual circumstances). See also Small Systems Comments at 11. Small Systems has no objection to industry-wide depreciation schedules as long as they are fairly derived.

[262] See Comcast Comments at 4 and 45; California Cable Comments at 45; CATA Comments at 17 (". . . prescription of depreciation rates at this time would be a mistake."). NCTA believes that, at this stage, the Commission should monitor

Cablevision Systems urges the Commission to adopt a monitoring approach instead of prescription;[263] COA believes it would be better for the Commission to accept current depreciation practices, monitor results, and correct for observed abuses.[264]

---

depreciation practices. Should the Commission decide to prescribe depreciation rates, however, it must do so on a case-by-case basis. NCTA Comments at 25-27.

[263] Cablevision Systems Comments at 35-36 (stating that it would be willing to justify its depreciation practices in a cost-of-service showing or report on its practices pursuant to Commission information collection rules). See also Eagle Comments at 2-3 (adds administrative costs, especially for small cable operators); Media General Comments at 12 (GAAP is adequate); Georgia Cable Comments at 13-15; Medium Operators Comments at 22-24. Medium Operators submits the executive summary of a 1986 study by Ernst & Whinney (E&W) comparing the procedures used to account for depreciation by the telephone industry and by companies in industries with related characteristics. Medium Operators Comments at Exhibit 6, Ernst & Whinney Review of Depreciation Policies and Procedures in Selected Industries, Prepared for The United States Telephone Association December 6, 1986 (E&W 1986). E&W concludes that non-regulated companies generally expend very little effort evaluating depreciation methods, lives, and salvage. E&W 1986 at vi. Cable companies, E&W found, use franchise duration as the depreciable life of assets, apply depreciation rates to categories of equipment, use straight line depreciation methods, and ignore salvage as immaterial in developing depreciation rates.

Medium Operators also submits a study by Ernst & Young (E&Y) of the impact of the FCC's proposed cost-of-service rules. Medium Operators Reply at Attachment: Ernst & Young Cost-of-Service Regulation for Cable Operators (E&Y 1993). E&Y compares the range of depreciation rates of telephone and cable companies in 1986 (in E&W 1986) and 1991-2. In 1986 depreciation rates ranged from 6% to 9% for telephone and 4.25% to 10% for cable. In 1991-2 depreciation rates ranged from 6.7% to 7.5% for telephone and 6.4% to 16.2% for cable. Of the nine cable systems surveyed in 1991-2, seven had depreciation rates above the highest surveyed telephone rate. Three were above 13% and two were using accelerated depreciation methods. E&Y 1993 at 31-32. E&Y argues that the observed increase in variance in cable depreciation rates is due to anticipations of system rebuilds and should be allowed.

[264] COA Comments at 79 and Exhibit F at 49.

COA offers as a possible method to determine depreciation rates the "price cap carrier option" considered recently in a separate proceeding.[265] Under this option, common carriers subject to price caps would file proposed depreciation rates with the Commission. The Commission would propose to adopt the carriers' proposed rates and seek comment on their reasonableness. Prescription of rates would be based on the proposed rates and any comments made thereon.

130. The majority of local and state governments filing comments support prescription of depreciation rates,[266] but nonetheless are concerned about implementing prescription at the franchise level, which they believe would be too administratively burdensome.[267] New York advocates use of a band of industry-wide reasonable rates with a band of individual rates for each plant category.[268] Connecticut believes that monitoring of depreciation practices will suffice if cable operators are required to explain and justify their practices in the cost-of-service filings.[269]

131. Telephone companies offer different prescription approaches. Bell Atlantic favors uniform practices for cable and telecommunications companies.[270] GTE suggests formulating a depreciation standard for price caps that would be applied in

---

[265] COA Comments at 78. Accord Continental Comments at 87. See Simplification of the Depreciation Prescription Process, CC Docket No. 92-296, Report and Order, 8 FCC Rcd 8025 (1993) (Simplification Order) at ¶ 38.

[266] See, e.g., Municipals Comments at 17 and Seaford at 9-10 (apply all of the methods and procedures used to prescribe depreciation rates for local exchange carriers); Michigan Committee Comments at 10-11 and Utah Comments at 10-11 (establish an industry-wide depreciation rate); New Jersey Comments at 6 and A4; New York Comments at 7.

[267] See, e.g., Utah Comments at 10-11; Michigan Committee Comments at 10-11.

[268] New York Comments at 7.

[269] Connecticut Comments at 2. Connecticut also notes that depreciation is an extremely complex area, franchising authorities have not routinely evaluated depreciation in the cable industry for many years, and the potential effects on subscriber rates are great.

[270] Bell Atlantic Comments at 22.

cost-of-service proceedings.[271] BellSouth recommends that the Commission prescribe basic depreciation practices for all cable operators except those subject to effective competition.[272]

132. Comments on our tentative conclusion that depreciation rates should be designed to reflect and recover the cost of an asset over its useful life were mixed. Some cable interests agree with this conclusion but suggest that operators be allowed to challenge it on a case-by-case basis.[273] Cablevision Industries argues that we should require the use of straight line depreciation over the useful life of the assets on a system-wide basis and with assets broken into general categories.[274] Small Systems suggests that depreciation for cable operators be uniformly restated based on an average 12-year useful life.[275] State governments favor the useful life standard.[276] Arthur

---

[271] GTE Comments at 22.

[272] BellSouth Comments at 12-13.

[273] See, e.g., BC Comments at 10.

[274] Cablevision Industries Comments at 44-46. Cablevision Industries suggests as categories: plant, buildings, vehicles and maintenance equipment, and home equipment. See also Cablevision Systems Comments at n.77; COA Comments at 74; Continental Comments at 83; Viacom Comments at 47-50 (establish broad categories of assets on a system-wide basis and permit depreciation over the economic lives of assets on a straight line basis). But see Small Cities Comments at 19-24 (useful life is a not a reliable depreciation standard in an industry experiencing rapid technological and competitive change; encourages the Commission to consider technological life as a factor in setting depreciation rates).

[275] Small Systems Comments at 11. But see TCI Comments at n.23 (depreciation computed on straight line basis using estimated useful lives of 5 to 15 years for distribution systems and 3 to 40 years for support equipment); BC Comments at 10 (straight line method for depreciation of all assets with several asset categories but only 3 lives (10, 7, and 5 years)).

[276] Michigan Committee Comments at 10-11 and Utah Comments at 10-11 (favoring establishment of an industry-wide depreciation rate using book value of an asset calculated on a straight line remaining life approach); New Jersey Comments at 6 and A4 (straight line depreciation over useful life with useful life determined by industry standards); Municipals Reply at 5-6 and Seaford Reply at 5-6 (Commission should develop service life-

Andersen suggests that the Commission could prescribe a range of approved lives.[277] Aerie states that cable operators should not be permitted accelerated depreciation on existing plant or valuation above original cost of service.[278] BellSouth suggests that cable operators be permitted to estimate remaining life, with those estimates subject to comparison by the Commission against similar estimates offered by the cable operator for other purposes, such as SEC financial statements.[279]

iii. Discussion

133. After a careful review of the comments herein, we conclude that we need not adopt our tentative conclusion that we should prescribe depreciation rates.[280] We believe prescription of depreciation rates to be unnecessary, at least pending completion of the cost study and analysis that we are directing the Cable Bureau to undertake.[281] Further, we believe a depreciation prescription requirement would impose unjustified burdens without providing a balancing benefit to subscribers.[282] Instead, regulators will closely monitor industry depreciation practices and carefully review depreciation showings in individual cost proceedings to assure that these depreciation practices are reasonable. In addition, we will examine

---

based depreciation schedules).

[277] Arthur Andersen Comments at 21 and Arthur Andersen Reply at 5 (economic lives of fixed assets should be used to establish prescribed lives). See also ETC Comments at 7.

[278] Aerie Comments at 12 (any allowance of accelerated depreciation expense should be targeted for new plant).

[279] BellSouth Comments at 12. See also Bell Atlantic Comments, Vander Weide Affidavit at 20-21 (prescription of depreciation rates based on original cost and expected useful life would be correct from accounting and economic policy perspective).

[280] The Commission must prescribe depreciation rates for common carriers under Title II of the Communications Act. See 47 U.S.C. § 220(b). The Cable Act of 1992 includes no such requirement.

[281] See part XIII., infra.

[282] We note that nothing in the record indicates that operators' use of depreciation methodologies or rates has been abusive or even questionable.

depreciation practices of operators in individual cases to assure that resulting rates are reasonable.

134. We recognize, as stated in the Notice, that depreciation expense may significantly influence development of rates for cable service.[283] Allowing rapid depreciation could increase a system's cash flow and provide additional funds to invest in infrastructure, though the system is not obligated to use such funds for infrastructure improvements. Rapid depreciation can also increase subscriber rates. Depreciation practices will play an important role in our balancing of goals for cost-based rates of cable service.[284] Therefore, we may in the future revisit the issue of whether we should prescribe depreciation practices for development of rates for regulated cable service.

3. Taxes

i. Notice

135. In the Notice, we proposed to allow, in determining a cable operator's annual expenses, taxes incurred in the provision of regulated cable services.[285] We proposed that these taxes would include all state and federal taxes on the provision of cable service, and income taxes attributable to the provision of regulated cable service. We tentatively concluded that income taxes payable on income from cable operations by individual owners, partners or Subchapter S Corporation shareholders would not be recoverable in rates for regulated cable service.[286]

---

[283] Notice at ¶ 26.

[284] Regulators will review cost-based rates to ensure that an operator's depreciation methodologies have not produced unreasonably high rates for subscribers.

[285] Notice at ¶ 30.

[286] Id. at n.32. In the First Rates Reconsideration, we explained this distinction in the context of the actual cost methodology for equipment rates within the benchmark. We stated that

> The provision for income taxes is made to compensate the business entity for a cost of doing business and to allow it to earn a fair after-tax return on investment. Any business with a statutory income tax obligation thus may include the cost of such obligation in

ii. Comments

136. Cable operators generally agree with our proposal to treat taxes incurred in providing regulated cable service as an allowable annual expense; however, they object to limiting this tax treatment to Chapter C corporations.[287] They contend that the cable industry is comprised of all types of business entities, unlike a traditional public utility industry, which most often is comprised of Chapter C corporations.[288] In addition, cable operators contend that legal precedent supports the treatment of income taxes as an allowable annual expense for non-C corporation entities.[289] Cable operators argue that distinguishing between

---

> its rate calculations. However, because Subchapter S corporations, partnerships, and sole proprietorships do not have an income tax obligation as business entities, this provision is not applicable to them.

First Rates Reconsideration at ¶ 59.

[287] See, e.g., BC Comments at 15-16; Cablevision Industries Comments at 62-4 and Reply at 8-10; Cablevision Systems Comments at 38-40; Georgia Cable Comments at 15-17; NCTA Comments at 39-41 and KPMG, Peat Marwick Attachment at 1-4 and Reply at 15-17; Medium Operators Comments at 24-25 and Reply at 9 and E&Y Attachment at 34-41; SCBA Reply at 27-28; TCI Comments at 36-37; Time Warner Comments at 26-27; TMC Comments at 11; ParCable I and ParCable II ex partes. See also Arthur Andersen Comments at 22-24; ETC Comments at 7.

[288] SCBA states that two-thirds of its members responding to a survey did not pay a business level tax. SCBA Reply at 27, and Exhibit A. See also Medium Operators Reply, E&Y Attachment at 34.

[289] See, e.g., Cablevision Industries Comments at 62-64; NCTA Reply at 15-16 (citing Suburban Utility Corp. v. The Public Utility Comm'n of Texas, 652 S.W.2d 358 (Texas 1983)(Suburban); Moyston v. New Mexico Public Services Comm'n, 76 N.M. 146, 412 P.2d 840 (N.M. 1966) (Moyston); Greeley Gas Co. v. State Corp. Comm'n, 15 Kan. App. 2d 285, 807 P.2d 167 (Kan. App. 1991) (Greeley)). In Suburban, the Supreme Court of Texas held that a water utility organized as a Subchapter S corporation was entitled to a reasonable cost of service allowance for federal income taxes actually paid by shareholders or for the taxes the utility would be required to pay as a conventional corporation, whichever was less. 652 S.W.2d at 364. In Moyston, the Supreme Court of New Mexico found that rates which fail entirely to take

ownership forms for tax treatment will create artificial incentives for operators to alter their corporate status, which may be difficult for many operators, particularly smaller systems.[290] Cable operators believe that our proposal will punish certain operators because of their business form, which in most cases was chosen in an unregulated environment and for reasons unrelated to cable service rates or tax consequences.[291] Cable operators thus urge the Commission to reconsider our proposal and to design an income tax allowance that provides equal tax treatment of systems, for ratemaking purposes, regardless of ownership form.

137. Local authorities generally agree that inclusion of taxes incurred in providing regulated cable service is appropriate.[292] However, Michigan Committee and Utah oppose permitting operators to recoup federal income taxes,[293] and Austin

---

federal and state income taxes into account as operating expenses of a sole proprietorship utility are unfair, unjust, unreasonable, and discriminatory; the Court held that an amount equal to the tax the utility would pay if incorporated, is a reasonable and realistic amount to deduct from the utility's taxable income for ratemaking purposes. 76 N.M. at 161, 412 P.2d at 851. In Greeley, the Court of Appeals of Kansas, while apparently agreeing with the holdings in Suburban and Moyston, affirmed the Kansas Corporation Commission's disallowance of the recovery of state and federal income taxes by a Subchapter S utility, because it failed to provide competent evidence of the income taxes paid. 15 Kan. App. 2d at 287-8, 807 P.2d at 169-70.

[290] See, e.g., Cablevision Industries Comments at 62-64; Cablevision Systems Comments at 39-40.

[291] Cablevision Systems Comments at 39-40; BC Comments at 15-16.

[292] Seaford Comments at 10; Municipals Comments at 18; Utah Comments at 11-12; Michigan Committee Comments at 11-12.

[293] These authorities argue that it is unfair to permit cable systems to recover federal income taxes in rates because other types of businesses are not allowed to include such expenses as an annual expense on their books. In addition, they note that tax rates will vary according to an individual operator's tax breaks, an outcome they believe is inconsistent with public policy. Michigan Committee Comments at 11-12; Utah Comments at 11-12. Both state that cable operators should recover real estate, gross receipts, and state and local income taxes.

contends that only taxes actually paid, and not an amount based on the statutory tax rate, should be included as an annual expense.[294] Austin argues that, to the extent a cable operator realizes tax benefits, a matching principle should require the operator to pass through such benefits in subscriber rates.

iii. Discussion

138. Regulators have generally permitted rate-regulated companies to recover income taxes in order to compensate the utility for taxes imposed directly on the utility, but not for taxes imposed on individual investors in the utility. Regulated public utilities generally operate in the traditional corporate form. This has meant that corporate taxes may be recovered from subscribers whereas taxes on dividends paid to owners of the corporation may not be recovered from subscribers. As indicated, however, cable operators operate under diverse ownership forms including corporations, Subchapter S corporations, partnerships (including partnerships of other ownership forms), and sole proprietorships. Based on the record in this proceeding, we are persuaded that we should design an income tax treatment that permits recovery of income taxes regardless of the form of ownership of the regulated cable service enterprise.

139. We affirm our tentative conclusion that Chapter C corporations will be allowed to include in annual expense calculations all taxes on the provision of regulated cable service. For other ownership forms of cable operators -- subchapter S corporations, partnerships, sole proprietors -- the income tax allowance we adopt will be determined as follows: the permitted rate of return on the ratebase is first calculated in accordance with the requirements we adopt in this Report and Order.[295] This amount is then adjusted to remove any portion of the previous year's distributions after adjustment for capital contributions and interest paid.[296] The resulting sum, the amount retained in cable operations, will constitute the cable

---

[294] Austin Reply at 23-24. Austin notes than many operators actually pay taxes at a rate much lower than the statutory rate due to allowances permitted under the tax code.

[295] See sections III.A. (Ratebase), supra, and IV (Rate of Return), infra.

[296] This maintains the principle that taxes related to the provision of regulated service may be recovered from subscribers, but taxes on dividends paid to owners may not be recovered from subscribers.

operator's earnings subject to the income tax calculation.[297] The allowed income tax will be calculated by applying the grossed-up federal and state statutory corporate tax rates to the amount calculated as subject to the income tax calculation, regardless of the actual business form.[298] The calculated tax amount may then be included in calculating the total revenue requirement.

140. Traditional cost-of-service regulation allows for recovery of allowable tax expense on an annual basis. Here, however, it is possible that a rate set by cost-of-service will not be reviewed, nor any further cost support submitted, for a substantial period of time. Retained earnings depend closely upon the cable system's current financial requirements. Because this is a showing we do not intend to revisit, proposed tax expense in a cable cost-of-service showing should incorporate an adjustment of retained earnings to reflect likely changes. For example, the following illustration of the tax calculation methodology adjusts retained earnings over a three-year period:

---

[297] As stated in the Notice, operators should be compensated only for those taxes attributable to the provision of regulated cable service. Notice at ¶ 30.

[298] We note that the maximum current tax rate for individuals is higher than that for corporations. Thus, some owners of noncorporate cable systems may contend that application of the individual tax rate may be more appropriate where a cable system's ultimate owners are individuals. See, e.g., Medium Operators Comments at 25. However, we believe that the regulatory ease provided by application of a uniform income tax rate outweighs this concern. We reject Austin's suggestion that operators be allowed to include only taxes actually paid, not an amount based on the statutory tax rate, because that approach would not be consistent with principles of tax normalization as traditionally applied to regulated industries.

	Year 1	Year 2	Year 3
1 Ratebase	1000000	1000000	1000000
2 Allowed Return (@ 11%)	110000	110000	110000
3 Less Interest Expense	(10000)	(10000)	(10000)
4 Tax Gross-up:			
5 Allowed Taxable Return	100000	100000	100000
6 Distributions	50000	25000	160000
7 Capital Contributions	0	25000	10000
8 Amount Subject to Tax calc.	50000	100000	(50000)
9 Tax allowed at corp. rate (@ estimate 34% grossed up)	25758	51515	(25758)
10 Revenue Requirement:			
11 Allowed Return	110000	110000	110000
12 Tax Allowed	25758	51515	(25758)
13 Expenses	500000	500000	500000
14 Total Revenue Requirement	635758	662515	584242
15 Cumulative Tax Allowed:			
16 Beginning Balance	0	25758	77273
17 Current Provision	25758	51515	(25758)
18 Ending Balance[299]	25758	77273	51515

---

[299] Explanation of terms and calculations:

1. Line 3: An eleven percent rate of return is used only for purposes of illustration.

Line 6: A portion of distributions made must be associated with the provision of regulated cable services.

Line 7: A portion of contributions made must be associated with the provision of regulated cable services.

Line 8: Tax allowed is determined by subtracting distributions from allowed return and adding the amount of capital contributions. The amount of contributions added shall be no more than the amount of distributions for the period, however.

Line 9: The rate used in this illustration is a federal tax rate grossed up as follows: (.34/(1-.34)) = .51515)

2. Lines 8-9 of Year 3 demonstrate that, where distributions offset the total of allowed return and capital contributions, the amount subject to the tax calculation may be negative. In effect, this calculation would require operators to pay back to subscribers the tax benefits associated with earnings that had been achieved previously but were distributed in the current period. Since no annual adjustment will be made, this offset should be reflected in an operator's one-time showing.

141. We do not require the three-year calculation shown above. We do require, however, that cost-of-service showings that include a tax allowance show some calculation of likely changes in retained earnings. Our overall approach will establish a tax treatment that is equitable for all ownership forms.[300] This is fair to subscribers, as cable operators that are other than Chapter C corporations are compensated by subscribers only for those taxes attributable to earnings retained in the business and that can be used to provide service to subscribers, while taxes on profits and earnings paid to and potentially used by the owners for purposes unrelated to provision of regulated cable activities will be paid by those owners.

C. Test Year Methodology

i. Notice

142. In the Notice, we solicited comment on the appropriate methodology for selecting a test year.[301] The test year is used by the regulator as a basis for estimating future revenue requirements. This estimate is one of the most difficult problems in a rate case because while a regulator sets rates for the future, only historic data (expenses, revenues, demand conditions) is available as a guide. To the extent that relationship between these variables changes, the actual rate of return earned by the company may be quite different from the rate authorized by the regulator. For many years, regulators have adjusted test year data for "known changes." Known changes are generally defined as changes that actually took place during or before the test year (e.g., a new wage agreement that occurred toward the end of the year). More recently, due primarily to inflation, some regulators have modified the traditional test year approach by using a projected test year (either partial or full) or by permitting pro forma expense and revenue adjustments. Use of a projected test year is most often justified as a more accurate methodology for calculating future revenue requirement

ii. Comments

143. Arthur Andersen asserts that while the test year may

---

[300] We also adopt our tentative conclusion that cable operators shall be allowed to include state and federal taxes, such as property and sales taxes, incurred on the provision of regulated cable service as an operating expense regardless of business form.

[301] Notice at ¶ 55.

conceptually be any twelve month period, as a practical matter, the historic test year is probably most convenient for most cable service providers.[302] Arthur Andersen further asserts that the Commission should use the most recently completed accounting period available at the time of the rate filing, since this would reflect appropriate period-ending adjustments and has usually been subject to an independent audit.[303] Finally, Arthur Andersen maintains that the historic test year should be adjusted for "known and measurable" changes and that the Commission should specify the time frame for such adjustments.[304]

144. Cablevision Systems asserts that the Commission should permit the use of any test year at the discretion of the cable operator.[305] Eagle contends that the Commission should use an historic test year and recommends either the latest twelve month period or the latest complete fiscal year at the discretion of the cable operator.[306] ETS advocates an historic test year for three reasons: the actual data are known and not speculative; the use of projected test year data potentially results in more challenges to the assumptions used in the projections; and a projected test year is unfair to investors if the projected costs and expenses are underestimated, and unfair to ratepayers if costs and expenses are overestimated.[307]

---

[302] Arthur Andersen Comments at 33.

[303] Id. In most cases, Arthur Andersen notes, this period would be a calendar year, although some cable operators utilize a fiscal year.

[304] Id. For example, we could specify that the historic test year should be adjusted for changes through the date of filing, the date rates are expected to go into effect, or some point during the period in which the rates will be in effect.

[305] Cablevision Systems Comments at 41. If the Commission does prescribe a test year methodology, Cablevision Systems recommends a projected test year because ratemaking necessarily requires forecasting.

[306] Eagle Comments at 4. Eagle further recommends that new systems be permitted to use forecasted data if historic data are unavailable.

[307] ETS Comments at 2. ETS does maintain that a projected test year may be appropriate if it is certain that the cable operator will experience drastic change and historic data will not accurately reflect that change.

145. NCTA argues against establishing any specific test year methodology at this time, asserting that the Commission has insufficient experience with cable rate regulation to prescribe a methodology. Instead, NCTA proposes to require that whatever test year methodology is used is a reliable indicator of expected revenue requirements during the effective period of the rates being set.[308]

iii. Discussion

146. Based on careful consideration of the record before us, we are persuaded that use of an adjusted historic test year is the most appropriate methodology. The test year may be adjusted for "known and measurable" changes that have occurred by the time the rates take effect. We further find that the historic test year should be the operator's fiscal year. Thus, cost-of-service showings must be based upon the operator's most recently completed fiscal year.[309] In the case of new systems, for which no historic data are available, projected data may be used, but careful scrutiny shall be paid to the assumptions used.

IV. Rate of Return

147. A major component of our ratemaking methodology for cable operators that elect cost-of-service regulation is the rate of return those operators will be given an opportunity to earn on their allowed ratebase. In this section, we prescribe an interim, overall rate of return of 11.25% for use in cable cost-of-service proceedings.

A. Uniform Rate of Return

i. Notice

148. In the Notice, we proposed to include a reasonable return on allowed investment in the cost of service for regulated cable operations. We also proposed to establish that rate of return in this proceeding by prescribing a single, overall rate of return for use in all cable cost-of-service showings. We indicated that this approach would be preferable to establishing separate rates of return for each franchise area or cable company, an approach that we tentatively concluded would be impracticable. We sought comment on our proposals and analysis,

---

[308] NCTA Comments at 25.

[309] In the case of a cost-of-service showing arising in response to a complaint, the fiscal year should be the one most recently completed at the time of the filing of the complaint.

and on the alternative of establishing different rates of return for appropriate groups or types of cable operators.[310]

ii. Comments

149. Some cable operators agree with the Commission that it is not practical to establish a separate rate of return for each franchise area. Cablevision Industries and Viacom maintain that the Commission should prescribe a uniform national rate of return applicable to all cable systems.[311] Continental agrees in principle with the Commission's assessment that establishing an industry-wide rate of return would be highly preferable for the efficient administration of the cost-of-service rules by all stakeholders.[312]

150. Many telephone companies, state commenters, and municipalities also support an industry-wide rate of return. Telephone companies argue that a single rate of return for all cable operators is the only practical approach, and that setting separate rates of return for each cable operator or franchise area would be costly.[313] Most state and local governmental commenters support a single rate of return for regulated cable service, rather than setting a separate rate of return for each cable company or franchise area.[314]

---

[310] Notice at ¶ 46.

[311] Cablevision Industries Comments at 38-39; Viacom Comments at 44. These operators argue that the Commission should not create incentives for investors to favor cable operators in some regions over others. Cablevision Industries also asserts that the Commission in effect has already established a single uniform rate of return for the cable industry by setting a reasonable rate of return for developing equipment basket rates; it argues that there is no reason to apply a different approach to cable service rates. Cablevision Industries Comments at 39.

[312] Continental Comments at 58.

[313] Bell Atlantic Comments, Vander Weide Affidavit at 15; BellSouth Comments at 19; GTE Comments at 27-28.

[314] See, e.g., Michigan Committee Comments at 16; Municipals Comments at 25; New Jersey Comments at 4, 8-9; Seaford Comments at 12; Utah Comments at 16. Municipals and Seaford request that the Commission set a single rate of return for cable service, just as it has for the interstate access services provided by LECs.

151. Some cable operators argue that a cable firm's cost of capital varies to a large degree with location and size.[315] These commenters maintain that, as a result, small cable firms are inherently more financially risky than large operators, and thus should be allowed a higher rate of return.[316] Comcast claims that application of a single rate of return to an industry as diverse as cable would result in confiscatory rates.[317] TMC recommends that each cable operator be permitted to submit its own rate of return based on its capital structure;[318] Time Warner believes each cable system should be allowed to show the rate of return appropriate for the operations for which prices are being reviewed.[319]

152. Some commenters assert that, while a unitary rate of return may be appropriate for telephone company regulation, the cable industry is very different from the telephone industry, and merits different rate of return treatment.[320] Commenters describe the cable industry as inherently risky: California Cable contends that the Commission must ensure that investors are fully compensated for the risks they have assumed, and should thus require different rates of return for differently situated firms.[321] Others argue that the Commission should consider

---

[315] See, e.g., Avenue TV Comments at 5; BC Comments at 11; Comcast Comments, Report by AUS Consultants at 1; Georgia Cable Comments at 27; NCTA Comments at 20-22; Small Cities Comments at 32; TCI Comments at 37-50; TMC Comments at 16-17; Time Warner Comments at 13, 33-36.

[316] See, e.g., Avenue TV Comments at 5; BC Comments at 11.

[317] Comcast Comments at 37-38.

[318] TMC Comments at 16-17.

[319] Time Warner Comments at 13, 33-36.

[320] Time Warner and TCI contend that, unlike LECs, cable operators have different subscriber densities, penetration rates, churn rates, and collection levels. Time Warner Comments at 13, 33-36; TCI Comments at 37-50. TCI adds that, in contrast to LECs, cable firms are not close to being the same size, do not have the same credit ratings, and do not share a common management heritage. TCI Comments at 37-50 & Attachment A, Charles River Study, at 4-5.

[321] California Cable Comments at 10. See also Connecticut Comments at 3; NCTA Comments at 20-22; Time Warner Comments at 13, 33-36 (arguing generally that the risks that each cable

setting a range of permitted rates of return to help compensate operators for the risks present in their systems.[322] New York maintains that the Commission should set two separate rates of return, one for publicly-traded and the other for privately-held firms, rather than separate rates of return for each franchise area.[323] Small Cities contends that firm or ownership unit size, rather than individual system size, should be the operative measure for rate of return calculations, since it is on the former basis that financing is obtained.[324]

iii. Discussion

153. In proposing to establish a single, overall rate of return for cable cost-of-service proceedings, we stated that individualized rates of return might permit the most precise balancing of subscriber and operator interests. We indicated, however, that the burdens on franchising authorities, cable operators, and the Commission of establishing individualized rates of return would outweigh any possible increase in precision from individualized treatment.[325]

154. The record confirms that the burdens of establishing an individualized rate of return for each cable operator that elects cost-of-service regulation would be substantial. Such an undertaking would require cable operators to present, and franchising authorities or the Commission to review, analyses of matters such as the risks individual cable systems encounter in providing regulated cable service and the sources of capital available to finance those risks. We are not persuaded that it is necessary for cable operators and regulators to undertake such analyses to ensure that cable operators can attract the capital needed to provide regulated cable service.[326]

---

operator faces are impossible to equalize using a unitary rate of return).

[322] See, e.g., Cablevision Systems Comments at 38-39; COA Comments, Report by AUS Consultants, at 60.

[323] New York Comments at 10.

[324] Small Cities Comments at 27-29.

[325] Notice at ¶ 46.

[326] We note that the parties to this proceeding have presented only conclusory statements regarding the risks cable operators face, and have not attempted to distinguish between the risks of regulated cable operations and other enterprises in

155. Although some commenters argue that we should prescribe a range of permitted returns, or separate rates of return for publicly-traded and privately-held firms, to help compensate cable operators for the particular risks they encounter, these commenters do not provide any concrete information that we could use to distinguish among different cable operators or cable systems. In particular, the parties have not proposed a specific mechanism for identifying, nor does the record reveal, a discernible relationship between the cost of capital for regulated cable service and the cable system's size or location, or the cable operator's method of financing. Therefore, we reject these commenters' arguments. Further, we believe that a carefully determined single, overall rate of return for regulated cable service will enable cable companies to earn a reasonable return on their allowed investment, while protecting consumers from unreasonable rates. We reject the assertion that we must ensure that investors are fully compensated for risks unrelated to the provision of regulated cable service. We prescribe a rate of return to ensure that companies have the opportunity to earn a reasonable recovery on their prudent investment in property that is used and useful for that service.

156. Some cable operators may believe that the overall rate of return we establish is inadequate to compensate them for the risks they encounter in providing regulated cable service. Similarly, consumers may find this overall rate excessive, given the individual operator's specific circumstances. To ensure the reasonableness of all rates set in cable cost-of-service proceedings, we will not foreclose parties to such proceedings from attempting to justify different rates of return.[327]

---

which cable operators engage.

[327] Parties that seek rates of return different from the prescribed interim rate of return, or any subsequently prescribed rate of return, bear a heavy burden. In particular, each cable operator seeking a higher rate of return is required to show exceptional facts and circumstances that make the cost of capital for the regulated cable services of the system whose rates are at issue exceed the prescribed rate of return, and that those facts and circumstances will persist. All necessary supporting information shall be included in the challenging cable operator's initial cost-of-service showing. Similarly, local franchising authorities may collect and consider evidence that the operator's cost of capital for the individual system is lower than the prescribed rate. The Commission will review all evidence relied upon by local franchising authorities in setting rates of return different from the prescribed rate. In part X., infra, we

Accordingly, we establish an overall rate of return for application to cable operators in individual cost-of-service proceedings.

B. General Methodology

i. Notice

157. In the Notice, we invited comment on the method we should employ to establish a single overall rate of return. We proposed to identify one or more surrogates having risks comparable to those cable operators encounter. We tentatively concluded that the Standard and Poors 400 Industrials (S&P 400) offers a broad range of investors' expectations regarding the trade-off between risk and return, and that investors in the S&P 400 experience risks that are roughly equivalent to those experienced in the provision of regulated cable service. We also tentatively concluded that either the S&P 400 as a whole, or a subgroup within it, would constitute a reasonable surrogate for regulated cable service, and that the cost of capital of the S&P 400 should be our primary guide in determining the rate of return for regulated cable service.[328]

158. We also proposed in the Notice to determine the cost of capital by estimating the surrogate's cost of equity and cost of debt, and then deriving a composite, weighted average cost of capital reflecting the surrogate's capital structure. While we stated that this average would weigh heavily in our determination of an overall rate of return for cable cost-of-service proceedings, we recognized that the cable industry may differ from mature regulated industries that earn steady returns on investment. We also recognized that the cable industry is a relatively new industry, characterized by growth and earnings reinvestment as well as a heavy reliance on private and semi-public sources of capital, and that cable investors' expectations may differ from those of other investors. We invited commenters to submit detailed economic analysis on the extent to which these differences should affect our development of a rate of return for cable. We also invited expert economic analysis regarding the models we should employ to ensure that we establish a reasonable rate of return.[329]

---

address hardship relief for cable operators that believe the end result of our methods threaten their financial health and continued ability to provide regulated cable service.

[328] Notice at ¶¶ 48, 50.

[329] Id. at ¶¶ 48-49.

ii. Comments

159. While many parties proposed cable surrogates, none provided a detailed analysis that attempted to quantify the risks of regulated cable service. Some commenters accept the use of the S&P 400 as a suitable surrogate as a starting point for estimating the cost of capital.[330] These commenters, however, suggest varying approaches to adapting the S&P 400 to what they perceive to be the unique risk characteristics inherent in the cable industry. Several commenters suggest a rate of return at least two percent above the S&P 400 average to adjust for the added risk of cable investments.[331] Bell Atlantic urges a capital structure composed of 86% debt and 14% equity, and suggests that, given this capital structure, the third quartile of the S&P 400 would represent an overall risk level comparable to cable industry investments.[332]

160. NCTA opposes using the S&P 400 as a surrogate, contending that the average risk characteristics of companies within that group are too removed from cable company risks to offer a meaningful comparison.[333] TCI contends that S&P 400 data are an inappropriate substitute for specific data unique to the cable industry.[334] Georgia Cable argues that cable companies, unlike the companies in the S&P 400, are small entities that

---

[330] See, e.g., Bell Atlantic Comments at 28; BellSouth Comments at 20; CFA Comments at 7; Cablevision Industries Comments at 41; Continental Comments at 59; GTE Comments at 28.

[331] See, e.g., Cablevision Industries Comments at 41; Continental Comments at 61, 72.

[332] Bell Atlantic Comments at 28. Bell Atlantic's consultant, Vander Weide, followed the methodology we employed in Represcribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers, 5 FCC Rcd 7507, 7513, paras. 57-60 (1990) (1990 Telco Represcription Order), recon. denied, 6 FCC Rcd 7193 (1993), aff'd sub nom. Illinois Bell v. FCC, 988 F.2d at 1266. In that proceeding, DCF estimates for all the companies in the S&P 400 for which sufficient data were available were ranked in order of their DCF cost of equity estimates, and then grouped into quartiles (the first quartile containing the companies with the lowest estimated costs of equity).

[333] NTCA Comments at 22-23.

[334] TCI Comments at 44-45.

depend heavily on private and semi-public sources of capital.[335]

161. Other commenters suggest the LEC industry as an appropriate surrogate. Municipals argues that telephone companies are comparable to cable companies because both are local distributors with "virtual monopolies" in their traditional business areas.[336] Michigan Committee claims that the competitive pressures placed on the cable industry by direct broadcast satellite services and multichannel microwave distribution services are comparable to those telephone companies face from cellular services and competitive access providers.[337] Seaford and Municipals contend that the maximum allowed rate of return for cable companies should be set no higher than the rate of return prescribed for telephone companies because the cable and telephone industries face comparable risks. Indeed, these commenters suggest that an overall rate below the prevailing rate for LECs might be appropriate for both industries, given the recent general trend toward lower interest rates.[338]

162. Other commenters oppose the use of the telephone industry as a surrogate. NCTA, for example, argues that telephone, unlike cable television, is an essential service and therefore carries an investment risk below that of cable.[339] Other commenters would support reliance on the telephone industry as a partial surrogate only, incorporating other telecommunications companies, broadcast companies, leisure and recreation concerns, and selected companies from the S&P Industrials Index as a composite comparable group from which expected earnings and returns for cable companies can be estimated.[340]

163. Commenters generally do not oppose the proposed weighted average cost of capital methodology. That method assumes a post-tax return on equity. Comcast's and COA's expert, AUS Consultants (AUS), suggests that, as an alternative, we could estimate a pre-tax overall cost of capital, thus avoiding the

---

[335] Georgia Cable Comments at 28.

[336] Municipals Comments at 26.

[337] Michigan Committee Comments at 17-18.

[338] Seaford Comments at 12-13; Municipals Comments at 27.

[339] NTCA Comments at 24.

[340] See, e.g., Comcast Comments, Attachment at 6.

need to combine equity and debt cost estimates.[341]

iii. Discussion

164. We conclude that we should use the weighted average cost of capital method, with its cost of equity, cost of debt, and capital structure components. Although Comcast's and COA's consultant, AUS, proposes a pre-tax overall cost of capital, that proposal is based on AUS's comparable earnings methodology. Since we reject that approach, infra, we will apply the more traditional, weighted average cost of capital approach.

165. In order to apply that method, we must estimate the cost of the capital contributing to the provision of regulated cable service. Most cable companies have diverse operations. Even those described as "pure play" cable operators provide a mixture of regulated and unregulated services.[342] No company for which the parties presented data engages only in provision of regulated cable service, and surrogate firms must thus be chosen to represent the risks of regulated cable in any cost of capital analysis.

166. The surrogate firms must operate at levels of risks comparable to those of regulated cable service, because our fundamental goal is to determine the return required to compensate investors for the perceived risks of regulated cable service and to attract capital to that service. In choosing surrogate firms, we must also recognize the limitations imposed by the available information. Because we have different kinds of information available with regard to cost of equity, cost of debt, and capital structure, we address each of these components of the overall cost of capital separately. Sections IV.C. through IV.E., infra, provide our analyses.

C. Cost of Equity

i. Introduction

167. The ideal cost of equity estimate should accurately reflect investor expectations as to the returns, both in terms of capital gains and in terms of dividends, investors will earn. Since investor expectations are not directly measurable, a variety of indirect methods are used. Generally the methods used by commenters in this proceeding fall into three categories:

---

[341] Comcast Comments, AUS Consultants at 3.

[342] A "pure play" cable operator would engage in no business other than the provision of regulated cable service.

risk premium, discounted cash flow (DCF), and comparable earnings. Commenters submitted four studies.[343] Two studies use the capital asset pricing model (CAPM) version of the risk premium method to analyze cable surrogates and cable companies.[344] One study relies upon the DCF method to analyze the S&P 400. The final study applies the comparable earnings methodology to surrogate groups and cable companies. In Attachment D, we describe these three methods of estimating the cost of equity and our analysis of the studies submitted by commenters advocating them.

168. In the Notice we proposed to apply the DCF method to the companies composing the S&P 400.[345] We indicated that companies in the S&P 400 as a whole, or a subgroup within it, encounter risks comparable to those encountered by companies that provide regulated cable service, and that an average of DCF cost of equity estimates for the S&P 400 could therefore serve as an estimate for the regulated cable industry's cost of equity. We thus tentatively concluded that S&P 400 data should be our primary guide for our cost of capital determination.

ii. Comments

169. As previously stated, the record contains four studies addressing cost of equity issues. CATA presents a CAPM study performed by Peter K. Pitsch (Pitsch) that estimates a cost of equity for cable of 18%. Based on this study, CATA recommends an overall rate of return in the 15% to 17% range in recognition of the cable industry's asserted lack of access to public debt and stock markets.[346] Cablevision Industries, relying on a CAPM study conducted by the Brattle Group (Brattle), recommends a 16% overall rate of return for the cable industry.[347] Bell Atlantic relies on the results of the DCF analysis by James H. Vander Weide (Vander Weide), and recommends a cost of equity between

---

[343] These submissions were made in August 1993 and appear to be based on data from 1992 and early 1993.

[344] The CAPM approach relies on betas, a measure of the unavoidable risk that investors bear in holding a security, as the primary measure of the risks for which investors expect compensation.

[345] Notice at ¶ 52 and Appendix C.

[346] CATA Comments at 12.

[347] Cablevision Industries Comments at 42.

11.85 and 15.11% depending upon the capital structure adopted.[348] Comcast and COA propose a pre-tax cost of equity of 18.9% based on the results of a comparable earnings study performed by AUS.[349]

170. BellSouth maintains that there are no publicly traded "pure play" cable operators that provide only regulated cable service. It notes that by definition regulated cable services remain monopoly services and thus, it argues, the risks associated with regulated cable are something less than that associated with the S&P 400 as a whole. BellSouth recommends the average return of companies making up the lower range of the S&P 400 be used as a surrogate to develop the equity element of the cost of capital for regulated cable service.[350]

171. GTE submits that the risks of cable and telephone are similar and recommends using the S&P 400, concentrating on those companies with returns on equity in the upper quartile.[351] CFA maintains that cable has a degree of market power enjoyed by few S&P 400 companies and that cable faces no real competition. It asserts that this lower risk makes the bottom quartile of the S&P 400 an appropriate surrogate for cable.[352]

172. Small Cities states that it was recently told "that a 20% cash-on-cash return would be required to attract equity in today's market for small companies."[353] Avenue states that a typical return on equity for cable companies is 12%-15%.[354] NCTA's consultant, Economist, Inc., concludes that cable is 30%

---

[348] Bell Atlantic Comments at 26-29.

[349] Comcast Comments at 39; COA Comments at iii, 85. Comcast states that this pre-tax 18.9% overall cost of capital is the equivalent of 12.9% after-tax overall cost of capital. Comcast Reply, Schink Affidavit at 5, n.2. The after-tax cost of equity appears to be 16%. See Comcast Comments, AUS Consultants, Exhibit 6, at 30.

[350] BellSouth Comments at 20.

[351] GTE Comments at 28.

[352] CFA Comments at 7.

[353] Small Cities Comments at 32. Small Cities does not explain the meaning of "cash-on-cash return."

[354] Avenue Comments at 5.

to 50% riskier than the overall market.[355] Time Warner's consultant, NERA, provides for illustrative purposes cost of equity estimates for three cable companies. Using an 8.6% risk premium, NERA's average estimate (weighted by company size) is 18.4%. NERA notes that betas of the three companies have risen from previous results, and ascribes this increase to anticipation of regulation-depressed earnings.[356]

iii. Discussion

173. We find arguments against the DCF methodology and against the use of the S&P 400 as a surrogate unpersuasive. For the reasons stated in Attachment D, we are also unpersuaded that other approaches suggested in the cost of equity studies by commenters are superior. Accordingly, we apply the DCF methodology to the S&P 400 to develop the cost of equity for companies providing regulated cable service.[357]

174. The S&P 400 includes companies spanning a very wide range of total risks, and a wide variety of combinations of financial and business risks. A primary reason for our choice of the S&P 400 as a surrogate is that the information relied upon by investors to assess the risks of S&P 400 companies is widely available. In contrast, cable equity is generally closely held, and information on its risks and expected returns is not a matter of public record.[358] We also believe, as explained below, that the DCF methodology is the best, most appropriate methodology for determining the cost of capital in this case.

175. In opposing the S&P 400 as a source of surrogates for estimating the cost of equity for cable, the parties make two basic assertions. The first is that neither the S&P 400 nor any subgroup of the S&P 400 combines financial and business risks in the same proportions as cable.[359] We believe that investors care

---

[355] NCTA Comments, Appendix B at 5.

[356] Time Warner Comments, NERA Proposal at 11-13.

[357] The D. C. Circuit has affirmed the use of the DCF method to prescribe interstate rates of return. See, e.g., Illinois Bell Telephone Co. v. FCC, 988 F.2d at 1266.

[358] Notice at ¶¶ 48-50; Bell Atlantic Comments, Vander Weide Affidavit at 11.

[359] Business risk stems from the inherent variability in the pre-tax return of a company's operations. Financial risk is the additional risk to equity investors created by the use of

about (and therefore an investment's required return reflects) the composite (financial and business) risk of a potential investment. Therefore, we find the parties' objection unpersuasive.

176. The second assertion is that the cost of equity for regulated cable service exceeds that found for the S&P 400, or for any subgroup thereof. The parties rely on two sources for this assertion: the cable stock betas and cable capital structures. As we note in Attachment D, the high betas of some cable equity issues reflect the closely-held nature of the stock. We believe that the historic pattern of fluctuations in cable stock prices is not purely the outcome of the changing risk-and-return assessments of market investors, but instead reflects in large measure insider decisions regarding cable stocks. Even if cable betas were purely a reflection of the changes in investor evaluations of the risks and return from cable services, we would still have to adjust for the monopoly-profit component of investor expectations. We believe that the monopoly profit component was by far the most variable element in investor expectations. We, therefore, give no weight to this source of evidence about the risks of the cable industry.

177. The parties also identify the capital structure of the cable industry as a source of financial risk, and we agree that this is so. Investors assess all sources of risk, and will consider that one element of risk, relatively high financial risk, may be offset by another element, relatively low business risk. We believe the cable industry attained its current high levels of debt financing largely on the basis of its low business risk. None of the parties has demonstrated that the overall risks of regulated cable service exceed that of the S&P 400 companies, and we find assertions to that effect not credible.

178. The objections parties raise to use of the DCF method center on its application to specific cable companies. Cablevision Industries and others reiterate our caution in the Notice that analysts' estimates for pure growth companies must be carefully scrutinized.[360] We generally agree that DCF, like CAPM,

---

financial leverage (debt) to fund those operations.

[360] Cablevision Industries, Brattle Return at 7. Brattle raises a more general objection to DCF by arguing that it does not separately value stock option rights associated with a stock. The DCF method relies in part upon the consensus estimates of analysts of the long-term earnings growth of a company. The implicit assumption is that the long-term growth in value of a company is fundamentally linked to increases in the company's

is difficult to apply to specific cable companies. The DCF method requires dividend, stock price, and estimated growth data regarding each company to which it is applied. The cable companies for which such data are available are closely held and subject to insider decisions. Further, we note that even if we were to apply the DCF method to data regarding the few "pure play" cable companies, we would have to adjust the estimates to obtain a reasonable surrogate for the cost of equity for regulated cable service.

179. These problems, however, do not affect the usefulness of the DCF method as a tool for estimating the cost of equity for companies within the S&P 400 and using those estimates to determine the cost of capital for regulated cable service. With regard to the studies submitted in this proceeding, we find the Vander Weide study more appropriate to the task at hand than any of the other submissions. The Commission's "classic DCF" methodology, as employed by Vander Weide in estimating the cost of equity for the S&P 400, incorporates the risk-return assessments of virtually all stockmarket investors.[361] The long-term growth estimates relied upon by the DCF method represent the consensus estimates of a large number of widely-followed stock analysts.[362]

180. Although a number of cable operators suggest using cable companies as surrogates for determining the cost of equity for the provision of regulated cable service, the record does not support their use. As we previously stated, determining cost of equity requires indirect analysis, usually through models such as the DCF model and the CAPM model. We have been presented with

---

business and not to the company's financing. Brattle offers no examples of analyst estimates failing to incorporate the impact of known potential changes in the stockholder's claim on the company's future earnings.

[361] This reference is to the Vander Weide study Bell Atlantic submitted with comments. See Attachment D.

[362] In contrast, the CAPM estimates are based on statistics that are fatally flawed for estimating the cost of equity for regulated cable service. The beta estimates, as discussed above, are based on the history of price fluctuations in the shares of a few, closely-held cable companies and do not represent a valid measure of the future risks of capital devoted to the provision of regulated cable service. Although AUS's comparable earnings estimates rely on statistics regarding widely-held companies, the screens AUS employed to select these companies are invalid. See Attachment D.

essentially three methods for estimating the cost of equity for regulated cable service. In Attachment D, we explain why two of these methods, the CAPM and comparable earnings methods, cannot be applied to cable at this time, even though the methods' proponents use cable companies as surrogates for the provision of regulated cable service.

181. The remaining method, the DCF method, requires dividend, stock price, and estimated growth data. The cable companies for which this information is available are closely-held and subject to insider decisions. Thus, the data may reflect a bias for which we are unable to adjust. For these reasons, we reject, at this time, the use of cable companies as surrogates for the provision of regulated cable service. Given that we do not find cable companies to be useful surrogates and we reject other potential surrogates as set forth in Attachment D, we believe that the S&P 400 firms for which sufficient data are available to make DCF calculations provide a large group of publicly-traded firms that is roughly representative of the universe of nonregulated firms and, thus, provide the most appropriate source of surrogates for regulated cable service available in the record.

182. The DCF method, like the other methods the parties advocate, requires an assessment of the risks of regulated cable service in comparison to those of the chosen surrogate. The record provides little definitive analysis of the risks of regulated cable service and thus does not make clear which specific subgroup of the S&P 400 regulated cable most resembles in terms of risks. Given the paucity of the record, we believe that we should look at the S&P 400 broadly and define a broad zone of reasonableness for the cost of equity. Based on his DCF analysis, Vander Weide estimates the cost of equity for regulated cable service to be between 11.80% (the midpoint of the DCF cost of equity estimates for the first quartile of the S&P 400) and 15.11% (the midpoint of the DCF cost of equity estimates for the third quartile). We believe that these estimates provide reasonable outside bounds for the cost of equity for regulated cable service, approximately 12% and 15%. Because of the thinness of the record, we are unable to establish with certainty any specific number within this range as the cost of equity, nor do we believe there is a need to do so. Instead, we use this range, in combination with other elements of the weighted average cost of capital, to develop a zone of reasonable rates of return for regulated cable service.

183. We thus adopt the application of the DCF methodology to the S&P 400 in our development of a reasonable interim rate of return for regulated cable service activities. We perform our analysis in Section IV.F., infra, to set an overall rate of return based on our estimate that the cost of equity lies within this 12% to 15% range.

D. Debt

i. Notice

184. In the Notice we solicited comment on how we should measure the cost of debt for regulated cable service. We tentatively concluded that we should rely on the cost of debt of the surrogate we used to determine the cost of equity, but asked for comment on the weight to accord cable debt.[363]

ii. Comments

185. AUS (Comcast and COA) finds an average 1992 embedded cost of debt of 8.5% for five cable companies. AUS notes that more recent debt information would decrease its overall cost of capital recommendation by 0.25% to 0.50%. AUS also calculated the 1992 embedded cost of debt for the companies in its asserted comparable groups: 9.5% (industrial), 10.0% (broadcast), 8.1%(telephone), and 8.9% (recreation).[364]

186. Bell Atlantic's Vander Weide examines financial data for six cable companies, which provide cable service to approximately 30% of all cable subscribers. He divides interest expense by the book value of debt to arrive at an average embedded cost of debt of 7.8%.[365]

187. Small Cities states that its experience has been that senior bank debt costs small companies at least 1.24% and as much as 4% or more above the prime rate.[366] Avenue states that, as a privately held company, it does not have access to international debt rates such as the London Interbank Offering Rate (LIBOR), and that the average debt cost for similarly situated companies

---

[363] Notice at ¶ 53.

[364] Comcast Comments, AUS Consultants at 12, 19, 25, & Exhibit 1, p. 2.

[365] Bell Atlantic, Vander Weide Affidavit at 6.

[366] Small Cities Comments at 32.

is 10%-12%.[367]

iii. Discussion

188. The record on the cost of debt includes compilations of debt costs for specific cable operators. The information on is both industry-specific and concrete, and does not appear to share the biases we found in the cable company-specific information the parties used to estimate the cost of equity.[368] We believe it appropriate to rely on this information, instead of S&P 400 data, as a surrogate for the cost of debt for regulated cable service, because it is industry-specific and provides a sufficient basis for estimating that cost of debt.

189. The cost of debt found by Vander Weide for six cable companies was 7.8%. AUS found an 8.5% cost of debt based on 1992 data and notes it would be lower with more recent data. Several parties suggest higher debt costs, but provide no supporting documentation. Adelphia's SEC Form 10K for 1993 states that its floating note interest rates ranged from LIBOR plus 1.0% to LIBOR plus 1.5%. Its March 31, 1993 average debt rate was 8.65%.[369] TCI's SEC Form 10K for 1991 states 55% of its debt was fixed rate, with an average cost of 9.9% and 45% percent was variable rate, floating at the prime rate.[370] We note that currently the prime rate is 6% and LIBOR is 3.56% (90 day) and 3.75% (180 day).[371]

190. The range for the average cost of fixed rate debt established by this information for the most recently available period (1992-93) is 7.8% to 8.65%. The prevalence of floating rate debt financing in the cable industry persuades us to be cautious in selecting a percentage within this range. We believe that 8.5% represents a reasonable estimate of the cost of debt for cable. In addition to reflecting historical debt costs, this rate allows for an increase in the cost of floating rate debt above current rates.

---

[367] Avenue Comments at 5-6.

[368] See Attachment D.

[369] Adelphia SEC Form 10K at 34 (1993).

[370] TCI SEC Form 10K at II-4 (1991).

[371] The New York Times, Feb. 18, 1994, at D 12.

E. Capital Structure

i. Notice

191. In the Notice we asked parties to compare the capital structures within the cable industry to those within traditional regulated industries. We noted the difficulty in evaluating current cable industry practices given that much financing is provided by private or closely held companies for which SEC scrutinized statements of position are not available. We noted that at least some cable operators are very highly leveraged (that is, debt contributes all but a small portion of their total capital.) We sought comment on the impact of requirements adopted in this proceeding on the current overall financial structure of the cable industry. In particular, we asked for comment on the impact on the cable industry if we relied on a traditional regulated industry capital structure, such as one composed of 50% debt and 50% equity.[372]

ii. Comments

192. Comcast's consultant, AUS, found the equity/total capital ratios of 12 cable companies to range from nearly 50% to nearly -100%.[373] AUS recommends a hypothetical capital structure having 50% debt and 50% equity if the prescribed overall return is based on an after-tax cost of equity. AUS would eliminate the capital structure issue with a pre-tax overall return.[374]

193. Bell Atlantic's Vander Weide would use what he considers to be the actual capital structures of six large cable operators. He examined the balance sheets of these companies and found debt exceeding their total book assets or, in other words, that these companies had negative shareholder equity.[375] The average debt/debt + equity ratio was 113.77%. Excluding losses, the ratio was 86.01%. Vander Weide adopts the 86% debt figure, arguing that it is impossible to calculate an average cost of capital when debt exceeds 100% of total investor-supplied

---

[372] Notice at ¶¶ 48-49 and n.51.

[373] This ratio is negative when the company has used debt to finance accumulated losses that exceed the capital contributed by the equity holders.

[374] Comcast Comments, AUS Consultants at 8-10.

[375] Negative stockholder equity arises when companies finance accumulated losses with debt instead of with stockholder equity.

capital, and that 86% approximates industry's long-run target capital structure.[376] Vander Weide contends that hypothetical capital structures, such as a structure composed of 40% debt and 60% equity, or the 50% equity and 50% debt structure proposed in the Notice, would produce an overall cost of capital exceeding that required to attract capital to cable. He asserts that the S&P 400's average overall cost of capital of 11.88% would translate into an equity return of 36.93% for cable operators with 86% debt and 14% equity.[377]

194. Viacom rejects Vander Weide's use of average cable company debt, and argues that Vander Weide should more properly have used the average yield on cable bonds. Viacom asserts Vander Weide's calculated cable equity return would be only 23.4% if he had used an average cable bond yield of 10% instead of the average cable company debt cost of 7.8%. Viacom contends the cable equity return would fall to 17% had Vander Weide assumed the 73% debt/27% equity of cable companies studied by Brattle.[378]

195. Comcast's consultant, Schink, sees a 40% debt/60% equity capital structure as more appropriate for the assertedly high risks of cable.[379] He proposes that companies above 50% equity use their actual capital structures. Schink maintains that Vander Weide's 15.11% cost of equity for the third quartile of the S&P 400 would be 28.88% if adjusted from S&P 400 average capital structure of 44% debt/56% equity to 86% debt/14% equity.[380] Schink contends that this capital structure would

---

[376] Bell Atlantic, Vander Weide Affidavit at 6-10.

[377] Id. at 8.

[378] Viacom Reply at 6.

[379] Comcast Reply, Schink Affidavit at 4, 18-24.

[380] Schink states his calculation is based upon Eugene F. Brigham, Louis, C. Gapenski, and Dana A. Aberwald, Capital Structure, Cost of Capital, and Revenue Requirements (Public Utility Fortnightly, Jan. 8, 1967) (Brigham/Gapenski/Aberwald). Comcast Reply, Schink Affidavit, Appendix 12. Brigham/Gapenski/Aberwald reported that a reduction in the percentage of common equity from 50% to 40% in the capital structure increased the cost of equity by 1.2%. Schink's calculation starts with a 0.07% increase in equity cost for a one percent decline, and doubles the increase for every 10% decline in the equity portion of total capital. Thus, he increases the cost of equity by 0.42% as equity declines from 56% to 50%, and by 5.4% as equity declines from 20% to 14%.

increase the embedded cost of debt from the 7.8% to 11% (the yield on a low-rated 10-year bond), and would increase cable's overall cost of capital to 13.5%.[381]

196. Time Warner's consultant, NERA, contends that ratios based on book equity and debt vary widely within cable and that many cable companies have nearly zero or negative book equity. NERA argues that market value of cable equity and debt is more consistent with finance theory and provides market value debt/equity ratios for 24 cable companies. Calculating the average for NERA's group of companies with significant cable operations yields a capital structure composed of 60% debt and 40% market equity.[382]

197. Brattle (Cablevision Industries) would base capital structure on the market value, rather than book value, of equity and debt.[383] Brattle (Viacom) argues that only a small portion of market value of cable equity reflects monopoly profit expectations.[384] Pitsch assumes a 50% debt/50% equity capital structure.[385]

iii. Discussion

198. We have generally relied on embedded capital structures of the regulated entities' owners on the assumption that they represent the steady-state, long-term basis for financing regulated activity. However, the current capital structures in the cable industry are based on the use of debt, rather than a combination of debt and equity, to finance accumulated losses. We agree with the cable operators that suggest that these structures are not sustainable in the long-term. Although Vander Weide adjusts the capital structures by eliminating accumulated losses, we find his method arbitrary and

---

[381] Brigham/Gapenski/Aberwald, however, find that the overall rate of return is not affected significantly by capital structure changes.

[382] Time Warner Comments, Attachment, NERA, A Proposal for Backstop Regulation for Cable Television Prices, (NERA Proposal) at 14-15, Attachments D-H.

[383] Cablevision Industries Comments, Brattle Return at 12.

[384] Viacom Comments, A. Lawrence Kolbe and Susan E. Vitka, Rate Base Issues in Cable Television Cost-of-Service Regulation, (Brattle Ratebase) at 8-10, 18-26.

[385] CATA Comments, Pitsch Report at 21.

unlikely to provide a reasonable basis for setting prospective rates. Therefore, we reject the capital structure of 86% debt and 14% equity he proposes.

199. We also reject recommendations that we adopt capital structures based on the market value of equity. We believe that market value may reflect substantial expectations of non-competitive profits and of growth in nonregulated activities. In addition, the long-term average capital structure of the industry is not clear at this time. Therefore, we believe that we should consider a capital structure range, rather than a single capital structure, for use in our determination of the overall cost of capital for regulated cable operations. Based on the record, we believe that a wide range of capital structures, extending from 40% debt to 70% debt, is justified, and is consistent with the range for cost of equity estimates and the cost of debt adopted above.

F. Overall Cost of Capital

i. Notice

200. In the Notice we tentatively concluded that an overall cost of capital in the range of 10% to 14% would reflect a reasonable balancing of subscriber and cable operator interests, and that we should select a return from within this range to achieve our balancing of goals for cost-based rates for cable service. We sought comment on choosing the maximum allowable rate of return for regulated cable service from within this range.[386]

ii. Comments

201. AUS (Comcast and COA) states its overall recommendation in terms of a pre-tax cost of capital. Schink calculates a 12.9% after-tax cost of capital based on the AUS recommendation.[387] Bell Atlantic's Vander Weide recommends an overall rate of return of 8.83%. This rate combines the 15.11% average DCF cost of equity for the third quartile of the S&P 400 and a 7.80% cost of debt with the 86% debt/14% equity capital structure he calculated by excluding accumulated losses from the capital structures of six large cable companies. Vander Weide would use the 11.80% first quartile S&P 400 average cost of

---

[386] Notice at ¶ 52.

[387] Comcast Comments, AUS Consultants at 18-21, 25. Comcast Reply, Schink Affidavit at 5, n.2.

equity if a 50% debt/50% equity capital structure is adopted.[388]

202. Small Cities proposes an overall rate of return of 15% to 20% for rural areas.[389] Avenue proposes an overall rate of return of 15% to 20% based on an equity return of 12% to 15%, debt costs of 10% to 12%, and a desired debt-to-equity ratio of 10%.[390] Medium Operators recommends an 18% to 20% rate of return.[391] Municipals would prescribe a rate of return no higher than interstate rate of return currently in effect for LECs. Municipals contends that the current 11.25% prescription for LECs is too high because the cost of capital has dropped precipitously since this return was adopted in September 1990.[392] Austin sees regulated cable service as not particularly risky and more akin to regulated telephone service. Austin argues that the telephone return of 11.25% is too high for cable because cable is financed with far less equity than assumed by the telephone prescription.[393]

203. Cablevision Industries recommends 16% as the overall average cost of capital for cable, based upon a 2% premium added to the top of the 10% to 14% return range proposed in the Notice.[394] Cablevision Industries also proposes that operators with rates targeting the prescribed rate of return be allowed 1% more if it can be achieved through increased efficiency.

iii. Discussion

204. The Cable Act of 1992 requires that our rate regulations provide cable operators the opportunity to earn "a reasonable profit" while "protecting subscribers ... from rates ... that exceed what would be charged ... if such cable system were subject to effective competition."[395] Companies regulated

---

[388] Bell Atlantic, Vander Weide Affidavit, p.13-14.

[389] Small Cities Comments at 31.

[390] Avenue Comments at 6.

[391] Medium Operators Reply at 10.

[392] Municipals Comments at 27.

[393] Austin Comments at 13.

[394] Cablevision Industries Comments at 38-43; accord, Viacom Comments at 43, 46.

[395] 46 U.S.C. § 623(b)(2)(C)(vii) and (b)(1), respectively.

under this standard must be allowed the opportunity to earn a return sufficiently high to maintain the company's financial integrity and ability to attract new capital. At the same time, the prescribed return must not produce rates that are unreasonable. The courts have recognized that there is a zone of reasonableness within which reasonable rates may fall, and that we must use our judgment to select a return within that zone.

205. In the previous sections we have considered the evidence presented by the parties, and have identified a reasonable range for the cost of equity for regulated cable service. We have also identified a cost of debt and a reasonable range for the capital structure. The following table combines all these elements and presents the overall cost of capital implied by these ranges.

Calculation of Overall Rate of Return[396]

	Debt Portion of Capital Structure			
Equity Estimate	40%	50%	60%	70%
12%	10.6%	10.3%	9.9%	9.6%
13%	11.2%	10.8%	10.3%	9.9%
14%	11.8%	11.3%	10.7%	10.2%
15%	12.4%	11.8%	11.1%	10.5%
Average	**11.5%**	**11.0%**	**10.5%**	**10.0%**

Debt Cost: 8.50%

206. We do not believe that any one cell in this table should be given definitive weight. We therefore concentrate on the averages shown on the last row. Based on these averages, we find that the overall cost of capital for regulated cable service lies within a "zone of reasonableness" of 10.0% to 11.5%.

207. We believe that it is appropriate to be cautious when selecting a number within this zone, since the record is less than perfect. In addition, we cannot know with certainty the risks of regulated cable operations, since those risks are

---

[396] For example, the upper left square's result is calculated: 12% x .60 + 8.5% x .40 = 10.6%.

dependent in part on the cost-of-service rules and principles adopted in this Order and on our revised benchmark methodology. Our caution in prescribing is reinforced by our desire to encourage infrastructure development. We believe that prescribing a return toward the upper end of the zone of reasonableness will enable cable operators to attract the capital needed to provide regulated cable service and to expand their regulated offerings. Based on these considerations, we are prescribing an overall cost of capital of 11.25%, a figure that lies between the two estimates at the upper end of the range.[397]

208. As further evidence of our caution, we note that our prescription is an interim one. In the Further Notice, we seek information on the relative risks of cable operations given our recent actions, and we seek further analysis of S&P 400 companies' costs of capital.

V. Accounting Requirements

i. Background

209. Under existing rules, regulated cable operators are required to maintain their accounts in accordance with GAAP.[398] They also are required to maintain their accounts in a manner that will enable identification of appropriate costs and application of cost assignment and cost allocation procedures to cost categories necessary for rate adjustments due to changes in external costs and for cost-of-service showings.[399] In addition, for accounting purposes, cable operators are generally required to aggregate expenses and revenues at either the franchise, system, regional or company level in a manner consistent with the practices of the operator as of April 3, 1993.[400] Costs associated with franchise fees, franchise requirements, local taxes, and local programming must be identified at the franchise level.[401]

---

[397] In implementing this rate of return in individual cases, we will include a tax allowance as specified in part III.B.3., supra.

[398] 47 C.F.R. §76.924(b).

[399] 47 C.F.R. §76.924(c).

[400] 47 C.F.R. §76.924(d). Our rules erroneously identified this date as April 3, 1992. The rules that we are adopting with this Report and Order will correct this error.

[401] Id.

ii. Notice

210. In the Notice, we sought comment on supplemental financial and accounting requirements that were contained in Appendix A.[402] We proposed that all cable operators would be required to maintain their accounts in a manner that would permit them to report in accordance with these requirements if they elect cost-of-service regulation.[403] We also sought comment on whether we should establish a uniform accounting system for cable operators electing cost-of-service regulation similar to the Uniform System of Accounts (USOA) for telephone companies in Part 32 of the Commission's rules.[404] Finally we asked for comment on the organizational level at which we should require that costs be identified.[405]

iii. Comments

211. Several cable operators argue that we should not adopt additional accounting requirements until all of the rules for determining just and reasonable rates have been adopted.[406] Comcast claims that most operators comply with GAAP and that GAAP standards are sufficient for monitoring the cable industry.[407] NCTA states that the Commission can consider adopting an accounting system for the cable industry if the Commission

---

[402] Notice at para. 58. Appendix A proposed an income statement that provided accounts for revenues, operating expenses, depreciation and amortization. Id. at Appendix A. It also proposed balance sheet information with a list of accounts for current assets, fixed assets, current liabilities, long term liabilities and owner's equity. Id.

[403] Notice at ¶ 58.

[404] Id.

[405] Id. at ¶¶ 59,64.

[406] See, e.g., Cablevision Systems Comments at 37 (Commission should establish an industry working group to determine the accounting requirements necessary for cost-of-service showings and assess the burden associated with such requirements); Comcast Comments at 45; Comcast Reply at 5-6 (achieving accounting uniformity in the cable industry will require a significant effort; consideration of accounting requirements should be deferred); NCTA Comments at 28-29.

[407] Comcast Comments at 45. Accord, NCTA Comments at 39.

ultimately finds that GAAP is inadequate.[408]

212. A number of commenters point out that cable companies have not maintained their accounting systems in a uniform manner nor at a high level of detail, and that to require them to do so now would be burdensome and costly.[409] Cable operators observe that an accounting system will not be necessary for the vast majority of companies whose rates will be regulated under the benchmark/price cap approach.[410] In addition, Aerie asserts that this Commission need not adopt an accounting system for the cable industry because state commissions have authority to require supplemental filings from cable operators.[411] Medium Operators also urge deferral of the accounting issues in this proceeding, and request that the Commission not limit itself by adopting detailed and rigid criteria in these early stages of regulation.[412]

213. Several telephone companies argue that cable operators should be made subject to the equivalent of the USOA that is

---

[408] NCTA Comments at 39.

[409] Adelphia Reply at 11-12; Cablevision Systems Comments at 5-51; Georgia Cable Comments at 32-33; Viacom Comments at 51. These commenters maintain that general reliance on GAAP in conjunction with uniform standards for specified critical areas may be adequate for case-by-case determinations of the adequacy of cost showings. See also TMC Comments at 16 (adoption of an accounting system for cost-of-service showings would place a costly burden on small cable operators, and the cost of this additional burden would be passed on to subscribers).

[410] Comcast Comments at 45; Continental Comments at 77-81; Georgia Cable Comments at 32-33; NCTA Reply at 8, 17-18; TCI Comments at 51; TCI Reply at 11; Time Warner Comments at 36-39. They contend that "only a minority" of cable operators will make cost-of-service showings and that it would be unfair and illogical to burden the entire industry with a system similar to the USOA for telephone companies.

[411] Aerie Comments at 15 (recommending that the Commission defer to any reasonable state commission determinations regarding accounting rules).

[412] Medium Operators Comments at 25-28.

imposed upon telephone companies.[413] BellSouth submits that, if cost-of-service filings are to be addressed efficiently, the Commission must adopt uniform accounting requirements to ensure that reported financial results are stable and consistent, and facilitate auditing.[414] BellSouth also suggests that, if the Commission determines that an accounting system would be too burdensome for small cable operators, the Commission can allow them to maintain accounts at a summary level.[415] Bell Atlantic states that an accounting system for cable operators is necessary for federal-state coordination.[416]

214. Other commenters support a simplified accounting system for cable, and suggest that the accounts listed in Appendix A to the Notice provide a satisfactory level to achieve the goals of uniformity and simplicity.[417] New Jersey urges the

---

[413] See, e.g., BellSouth Comments at 23-24; Bell Atlantic Comments at 14-15; GTE Reply at 22-23 (reliance on GAAP alone will not give the Commission sufficient information to meet statutory and constitutional mandates; without a uniform accounting system, operators will have the freedom to allocate costs as they choose, and the Commission will not be able to make meaningful comparisons to determine the reasonableness of such allocations). See also Bell Atlantic Reply at 8 (Commission should implement uniform cost accounting rules without delay, since existing cost accounting rules for telephone companies provide a ready model); accord, GTE Reply at 22-23.

[414] BellSouth Comments at 23 (expressing concern that the requirements proposed in Appendix A to the Notice are extremely basic and represent highly aggregated, organizational accounts, rather than functional accounts). Accord, Bell Atlantic Comments at 14-15 (symmetrical rules would preserve regulatory neutrality and economic efficiency, and would ensure that cable operators do not use revenues from regulated services to subsidize competitive business operations, including those that compete with the telephone industry. Bell Atlantic adds that a uniform accounting system, in conjunction with audit requirements, will allow regulators to enforce cost allocation and affiliate transaction rules).

[415] Id. at 23-24.

[416] Id. at 15. See also GTE Reply at 23 (GAAP does not provide sufficiently standardized rules to permit uniform allocations among business operations or between jurisdictions).

[417] Duncan Comments at 27-28; Seaford Comments at 13.

Commission to adopt an accounting system for all cable companies.[418] Arthur Andersen urges adoption of a simplified accounting system for cable operators that elect cost-of-service regulation.[419] Arthur Andersen states that this accounting system should be based on GAAP, and where GAAP is not specific, the accounting system should provide guidelines.[420] Acknowledging that cable operators almost universally oppose an accounting system as burdensome and prefer GAAP as the standard, Arthur Andersen suggests that the Commission could prescribe an account structure and accounting practices for reporting purposes only. Arthur Andersen states that this would allow cable operators to maintain books and records in a manner which both meets their own needs and provides the desired consistency of accounting and reporting for cost-of-service regulation.[421]

215. Cable operators discourage the Commission from either specifying averaging at the multiple system operator (MSO) level, or requiring the maintenance of costing detail at the franchise level. They generally request flexibility to average at the level most appropriate considering operator accounting and

---

[418] New Jersey Comments at 9-10 (suggesting that the accounts should provide for the identification of local operating expenses of MSOs and of allocations between regulated and non-regulated services). New Jersey suggests that this Commission may commence the process of establishing a uniform accounting system for cable operators by adopting a standardized reporting form similar to the one in Appendix B of the Notice. (Appendix B of the Notice contains FCC Form 326. This is the Annual Report of Cable Television Systems, which previously required all cable operators to report revenues and expenses, balance sheet information, and supplemental accounting information.)

[419] Arthur Andersen Comments at 34 (cable operators that elect the benchmark should be required to maintain their books in accordance with GAAP). Accord, NCTA Comments at 39.

[420] Id. For the purpose of establishing general principles governing the accounting system for cable operators, Arthur Andersen suggests that the guidelines included in Appendix A of the Notice could be adopted by the Commission. Arthur Andersen recommends that cable operators be directed to submit collectively a proposed accounting system that reflects the principles contained in Appendix A.

[421] Arthur Andersen Reply at 12.

operating practices.[422] Among smaller operators, Avenue TV and TMC express concern that the Commission will require detailed accounting at too low a level.[423] TMC suggests that cost-of-service showings should be at the company level rather than at the system or franchise level.[424] GTE suggests that costs be allocated at the highest level possible, to allow for simplification to the extent possible.[425] State regulator commenters suggest that the system level is the appropriate level for cost averaging.[426]

216. Arthur Andersen, however, states that it would be in the best interest of cable operators to determine cost of service at a level no higher than the franchise level, to avoid the inevitable response of competitors to rates which reflect unrelated costs.[427] Aerie cautions against allowing large companies to use simplified cost-of-service showings based on standardized costs, because such practices may provide substantial windfalls and duplicative recovery of costs.[428]

iv. Discussion

---

[422] See Cablevision Industries Comments at 54-56; Continental Comments at 73; Continental Reply at 8-9; TCI Comments at 56-58; Time Warner Comments at 39; Viacom Comments at 52-53. See also Georgia Cable Comments at 35 (it would be desirable to favor company-wide averaging because of its simplicity, but such an approach does not reflect reality, and operators should be allowed the flexibility to allocate costs in a manner that most accurately reflects reality); NCTA Comments at 38-39 (forced averaging applied in the wrong circumstances can result in overcharges to some subscribers and subsidies to others); COA Comments at 93.

[423] Avenue TV Comments at 5; TMC Comments at 19.

[424] TMC Comments at 19.

[425] GTE Comments at 25.

[426] NYS Comments at 9; New Jersey Comments at 1-2. NYS Commission and New Jersey state that the current practice is for system-wide averaging and recommend that this practice be adopted by the Commission. See also MCATC Comments at 8.

[427] Arthur Andersen Comments at 36 (referring to the competitive distortions resulting from averaging in the telecommunications industry).

[428] Aerie Comments at 11.

217. Cable Accounting System. We will adopt a uniform accounting system for cable operators that elect cost-of-service regulation in order to ensure that they accurately record their revenues, operating expenses, depreciation expenses, and capital investments. In the Further Notice, we seek comment on the precise form the accounting system should take. We also explain the process we intend to follow to develop and adopt an accounting system for cable operators.[429] The system of accounts we are proposing is contained within Attachment C.

218. Cable operators that are regulated under the benchmark/price cap approach will not, however, be required to maintain their accounts in accordance with a uniform system. We find that it is unnecessary to require uniform accounting under the benchmark/price cap approach because, while a uniform accounting system is designed to help measure a regulated company's cost of providing service, the benchmark/price cap approach is concerned with the prices a regulated company charges for providing service.[430]

219. A uniform accounting system is an important component of cost-of-service regulation, because accounting records will serve as the principle source of information for determining the reasonableness of rates charged by cable operators that elect cost-of-service regulation. We conclude that neither GAAP nor the interim summary level accounts that we are requiring with the adoption of this Order will adequately provide, in the long run, for uniform accounting practices among cable operators. A uniform accounting system is important, for example, to help ensure that cable operators that elect cost-of-service regulation properly distinguish between expenditures that should be charged to capital and those that should be charged to operating expenses.[431]

---

[429] See Further Notice, part XII.C., infra.

[430] It should be noted that in the Further Notice, we seek comment on whether we should require a uniform accounting system for cable operators who seek adjustments under the benchmark/price cap approach to reflect changes in their external costs. See Further Notice, Part XII.C., infra.

[431] If this distinction is not made properly, operators could manipulate their cost of service by charging operating expenses to capital or by charging capital expenditures to operating expenses. For example, some cable operators might categorize all replacements as operating expenses, even if the replacements constitute improved equipment, and other cable operators might categorize such replacements as capital

220. In addition, we believe a uniform accounting system will help minimize variations in accounting practices, thus simplifying cost-of-service proceedings. Since the accounting practices of cable operators may vary widely,[432] cost-of-service regulation could be less than ideally effective unless all operators that elect such regulation are required to follow a uniform accounting system. Uniform accounting has long been recognized as an important component of cost-of-service regulation.[433] In fact, all state and federal agencies that engage in cost-of-service regulation, including this Commission, recognize the importance of uniform accounting.[434]

---

expenditures. Further, without a uniform accounting system, the task of valuing property would be more complicated. Uniform accounting will help to ensure that cable operators electing cost-of-service regulation distinguish regulated investments, expenses, and revenues from nonregulated investments, expenses, and revenues. That will help ensure an accurate determination of the revenue requirement for regulated services, and will help prevent improper cross-subsidization of nonregulated services.

[432] See BellSouth Comments at 23.

[433] In upholding the Interstate Commerce Commission's uniform accounting regulations, the Supreme Court stated that

> Congress, in authorizing the Commission to prescribe a uniform system of accounts, recognized that accounting systems were not then uniform; and in reiterating this authorization in 1906, and adding a prohibition against the keeping of other accounts than those prescribed, manifested a purpose to standardize and render uniform accounts of different carriers with respect to matters that entered into property and improvements thereof, on the one hand, and the current operations of the company, on the other. . . . Plainly, the law-making body recognized the essential distinctions between property accounts and operating accounts, between capital and earnings; it recognized that the practice of different carriers varied in respect to those matters; and that no system of supervision and regulation would be complete without requiring the accounts of all carriers to speak a common language.

Kansas City S. Ry. v. United States, 231 U.S. 423, 442-43 (1913).

[434] All state commissions, for example, have adopted a uniform system of accounts for gas, electric and telephone utilities. National Association of Regulatory Utility Commissioners, Utility Regulatory Policy in the United States and

221. Although numerous cable operators have argued against the imposition of an accounting system because it would be burdensome, we conclude that the burden on those companies that elect cost-of-service regulation is outweighed by the need for the most accurate information possible on the companies' cost of service. Moreover, a uniform accounting system is important to the cost-of-service approach because it will reduce the administrative burdens on the Commission and on local franchising authorities. Without a uniform system, the regulatory body charged with evaluating cost-of-service showings may find it necessary to engage in greater scrutiny of each cost-of-service filing and to require cable operators to supplement and clarify their filings to ensure that cost-of-service principles are followed. Further, we are streamlining and simplifying the accounting system to the extent possible.

222. Interim Summary Level Accounts. We are adopting an interim summary accounting system for use by cable operators that elect cost-of-service regulation, until we have a permanent uniform system of accounts in place. Cable operators that elect

---

Canada, Compilation 1992-1993 (1993). The Securities and Exchange Commission maintains a uniform system of accounts for utility holding companies. 17 C.F.R. Part 256. The Federal Energy Regulatory Commission utilizes a uniform system of accounts for electric utilities and interstate natural gas companies. 18 C.F.R. Part 101.

In addition, this Commission has recognized the relative importance of a uniform system of accounts for ratebase/rate of return regulation of telephone. One of this Commission's first acts was to adopt a uniform system of accounts for telephone companies by modifying the system the Interstate Commerce Commission had created in 1913. Accounting Rules for Telephone Companies, Order No. 7-B, 1 FCC 43 (1935); Order No. 7-C, 1 FCC 45 (1935); Order No. 7-D, 3 FCC 9 (1937). In commencing the process of substantially modifying the uniform system of accounts in 1978, the Commission stated that the uniform system of accounts must provide "the type of information that is necessary to regulate an increasingly complex telecommunications industry." Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies (Parts 31, 33, 42, and 43 of the Commission's rules), Notice of Proposed Rulemaking, 70 FCC 2d 719 (1978). The Commission noted that "[t]o effectively regulate on a cost of service basis, we need reliable figures on operating revenues, plant investment and operating expenses and sub-categories thereof, broken down both by regulatory jurisdiction (i.e., interstate vs. intrastate) and by individual service categories." Id. at 721-22.

cost of service regulation shall identify costs in 55 summary level accounts contained in FCC Form 1220. This form requires that cost-of-service showings include a balance of broad summary level investment, expense, and revenue categories. These cost categories are similar to the categories that we proposed in the Notice, and we believe that this information will provide regulators with necessary basic information on the cable operators' costs of service. We note that there are no substantive objections to these requirements in the record.

223. We are concerned, however, that even this summary accounting approach may be burdensome for some small systems. We are directed by the Cable Act of 1992 to reduce the administrative burden on regulated cable operators, and particularly on small systems.[435] In order to provide further relief to small system, we are aggregating still further the summary level accounts that small operators will be required to report as a part of their cost-of-service filings.[436] Hence, small cable system operators shall identify their costs in FCC Form 1225, which contains 32 summary level accounts.

224. With regard to the level at which these accounting requirements apply, we will continue to require that cable operators electing cost-of-service regulation identify all amounts associated with each revenue and cost category, as provided for in FCC Forms 1220 and 1225, at the franchise, system, regional and/or company level, depending upon the organizational level at which the operator identified revenues and costs for accounting purposes as of April 3, 1993.[437] We will continue to explore in this proceeding the extent to which operators should be permitted or required to report average costs at levels different than those in effect on April 3, 1993.

225. Further, cable operators shall provide any additional financial data and explanations reasonably requested by franchising authorities and this Commission to substantiate cost-of-service showings or other related proceedings. Where a

---

[435] 47 U.S.C. § 623(b)(2)(A) and (i).

[436] We define a small system as an independent small system or a group of small systems owned by a multiple system operator that (1) has 250,000 or fewer subscribers, (2) owns only small systems with less than 10,000 subscribers, and (3) has an average system size of 1,000 or fewer subscribers. This standard of eligibility is the same that we adopt for other forms of small system administrative relief. See Benchmark Order at II.D.1.

[437] See Section 76.924(c).

reasonable response is not forthcoming, franchising authorities are authorized to make such disallowances as are appropriate, pending the presentation of convincing evidence by cable operators. The Commission will follow this procedure as well.

VI. Cost Allocation Requirements

i. Background

226. The purpose of cost allocation is to assign costs (both investment and expenses) accurately to the regulated services offered by an operator, so that the rates charged for such services are just and reasonable. The goal of cost allocation regulation is to provide a fully distributed costing methodology that emphasizes direct assignment and cost causation principles in assigning costs to the various services offered. Just and reasonable rates depend upon the support provided by the cost allocation methodology.[438]

227. In the Rate Order we adopted allocation rules for regulated cable operators.[439] These rules are applicable to cable operators for which the basic service tier is regulated by local franchising authorities or the Commission, or, with respect to a cable programming services tier, for which a complaint has been filed with the Commission. The requirements are applicable for purposes of cost-of-service showings and for rate adjustments for external costs.[440] Under these rules, cable operators that aggregate their expenses and revenues at the system, regional, or company level, are required to allocate these expenses and revenues to the franchise level based on the ratio of the total number of subscribers served at the franchise level to the total number of subscribers served at the higher level.[441] In

---

[438] For a disccussion of cost allocation requirements, see Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1310, para. 94 (1987). This Order provided standards for allocating telephone company costs between regulated and nonregulated activities. See also Amendment of Parts 32 and 74 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates, Notice of Proposed Rulemaking, CC Docket No. 93-251, 8 FCC Rcd 8071 (1993)(Telco Affiliate Transactions Notice).

[439] Rate Order at 8 FCC Rcd 5973-5976, ¶¶ 553-59.

[440] 47 C.F.R. § 924(a).

[441] 47 C.F.R. § 76.924(e)(1).

general, costs that are identified at the franchise level or allocated to the franchise level must be allocated among the basic service tier and each tier of cable programming services based on the ratio of channels in each tier to the total number of channels offered in the franchise area.[442]

228. The rules require that costs of programming and retransmission consent fees be directly allocated to the tier on which the programming is offered.[443] Further, costs associated with franchise fees must be allocated among equipment and installations, program service tiers and subscribers in a manner that is consistent with the methodology of assessment of franchise fees by local authorities.[444] Costs associated with public, educational, and governmental access must be directly assigned to the basic tier where possible.[445]

229. In the Rate Order we determined that common costs must be allocated to service cost categories based on direct analysis of the origin of the costs.[446] Where direct analysis is not possible, common costs must be allocated to service cost categories based on an indirect, cost-causative linkage to other costs directly assigned or allocated to the service cost category.[447] When neither direct nor indirect measures can be found, common costs must be allocated to each service cost category based on the ratio of all costs directly assigned and attributed to a service cost category over total costs directly assignable and attributable.[448]

ii. Notice

230. In the Notice, we proposed to require that cable operators allocate their costs among the following service cost categories: basic service tier activities, cable programming

---

[442] 47 C.F.R. § 76.924(e)(2).

[443] 47 C.F.R. § 76.924(e)(3).

[444] 47 C.F.R. § 76.924(e)(4).

[445] 47 C.F.R. § 76.924(e)(5).

[446] 47 C.F.R. § 76.924(f)(1). These rules are similar to the direct assignment process used in telephone regulation. See 47 C.F.R. Part 64.

[447] 47 C.F.R. § 76.924(f)(2).

[448] 47 C.F.R. § 76.924(f)(3).

services activities, other cable programming services activities, other cable activities, and non-cable activities.[449] We proposed that, to the extent possible, all costs should be directly assigned to their service cost category.[450]

231. The Notice also sought comment on whether we should adopt different or supplemental cost allocation requirements to govern allocation of costs between regulated cable service and unregulated activities.[451] We stated that we see a continuum between the poles of franchise-specific allocations and MSO-wide cost averaging, and that we would consider requiring cable operators either to identify all costs that are unique to the cost of the franchise, or to determine the average company-wide costs. We sought comment on which approach would come closest to achieving the right balance of accuracy and administrative burden. We also sought comment on how these proposals would affect the ability of cable operators to recover their costs, make improvements in service, and expand channel capacity and program offerings. In addition, the Notice sought comment on how these proposals would impact on the ability of the Commission and local franchising authorities to ensure reasonable rates for regulated services.

232. Within the context of our proposal to require the identification of costs to a franchise on a case-by-case basis, we sought comment on the level at which general industry practice would allow the identification of major categories of joint and common costs to the franchise level, and what costs are joint and common, and should be so allocated.[452] We requested comment, for example, on the impact of a per-subscriber allocator on the allocation of costs to systems with low and high penetration rates, and on how the number of channels in a tier might be

---

[449] Notice, Appendix A at 4-6.

[450] Id. at 4. As explained above, common costs are allocated in accordance with the allocation procedures set forth in Section 76.924(f). Under our proposal, costs in each service cost category would include recoverable costs as defined in Appendix A of the Notice; direct material and labor costs plus the indirect costs associated with the particular service cost category; marketing, advertising and general and administrative overhead costs associated with the particular service cost category; and all common costs assignable to the particular service cost category.

[451] Notice at ¶ 59.

[452] Id. at ¶ 64.

factored into the allocator.

iii. Comments

233. Some cable operators state that little or no additional specific allocation requirements are necessary.[453] Others express concerns with the specification of allocators, and especially with the concept of tier-neutral allocations.[454] Continental states that the application of a single basis across all cost elements would present problems, and urges the Commission not to mandate inflexible methods of allocating costs.[455] TCI urges that cable operators be allowed to support allocations on a case-by-case basis.[456]

234. Other cable operator commenters challenge the validity of channels as the basis of allocations between regulated and

---

[453] Cablevision Industries Comments at 49-50; Viacom Comments at 50-51 and 53-56; Medium Operators Comments at 5, 25-28 (the rules established in the Rate Order are sufficient for allocations between regulated and nonregulated operations and for determining initial regulated rates. For fiber optic upgrades and rebuilds, however, per channel allocations are not appropriate).

[454] See, e.g., Cablevision Systems Comments at 37-38 (costs are not incurred in proportion to the number of channels on a tier, so tier-neutral allocation could result in subsidy of one tier by another); accord, Continental Comments at 77-81.

[455] Continental Comments at 77-81. Accord NCTA Comments at 27-29. NCTA maintains that cable operator cost allocation practices vary widely and that it is too early in the process of establishing regulation to determine which allocation method is appropriate nationwide. Until a fuller understanding of cost allocation methods is attained, it recommends allowing operators to follow the rules currently in Section 76.924(f).

[456] TCI Comments at 51-56 (the Commission does not have appropriate experience in regulating cable, and it is impossible for the Commission to develop accurate cost accounting and cost allocation rules in a few months' time). See also Cablevision Systems Comments at 37-38; Continental Comments at 77-81; COA Comments at 87-91; Georgia Cable Comments at 34; Medium Operators Comments at 25-28.

nonregulated operations.[457] Arthur Andersen opposes allocation of costs between tiers on the basis of relative number of channels, and states that the Commission should adopt for cable operators the cost allocation principles used for telecommunications carriers. It argues that this is necessary because the two may eventually compete.[458] Other parties support the use of per-channel allocators.[459]

235. California Cable states that accounting-based allocation rules may not be workable. California Cable is concerned that decisions to expand systems and add unregulated services could be held hostage to inflexible allocation rules

---

[457] See Cablevision Industries Comments at 51-54 (allocations between regulated and nonregulated operations on the basis of channels are not appropriate for a digital world where capacity is measured in terms of bit rate rather than bandwidth); Discovery Comments at 8-10 (the concept of a standard channel is becoming anachronistic in the emerging digital environment of cable; the standard channel concept will be replaced by other concepts, such as bit rates received at the television receiver).

[458] Arthur Andersen Comments at 35-36. Summarizing these principles, it says that the Commission requires that costs be directly assigned to the maximum extent possible, causally attributed when they cannot be directly assigned, and finally, generally allocated based on the ratio of expenses directly assigned and attributed. Accord, GTE Reply at 25, 32-33. But see COA Comments at 87-91; COA Reply at 38. COA claims that we should not apply the existing telephone industry cost allocation rules to the cable industry. Unlike the telephone companies, which have not had to be concerned with start-up costs for years and have developed a "massive regulated revenue stream" to cover losses on unregulated services, cable does not have the luxury of wasting money from its core business to subsidize nonregulated operations. Accordingly, COA claims that the need for cost allocation rules to prevent abuse does not apply to cable as it does to telephone companies.

[459] CFA supports tier-neutral allocation on the basis of channels as a starting point, but also suggests that the Commission will have to develop a more complex theory of cost causation, as more complex enhancements, especially non-entertainment offerings, are added to the cable offerings. CFA Comments at 6. Similarly, Michigan Committee and others encourage the Commission to set up strict guidelines to provide better allocations or to prevent cross-subsidization of non-entertainment forms of service. Michigan Committee Comments at 20-22; see also Muzak Comments at 6; ETC Comments at 6.

which might allocate a disproportionate cost to any new expansion.[460] Small Systems recommends development of a model that would provide for different allocators to be applied to the appropriate expense and investment categories.[461]

236. Other parties argue that further allocation rules are necessary. BellSouth recommends that the scope of the cost allocation requirements in Section 76.924(a) of the rules be expanded to include all cable operators.[462] Bell Atlantic, claiming that there must be parity of treatment for telephone companies and cable operators, states that cost allocation rules must be established to allow the Commission to examine the manner in which cable operators allocate common costs among different lines of business and account for transactions between affiliates.[463]

iv. Discussion

237. We find that it is necessary to require allocation of costs to nonregulated service categories to help ensure that the allocation of costs to regulated services is fair and reasonable in relation to the allocation of costs to nonregulated services. Section 76.924(e)(2) of the Commission's rules currently requires that costs be allocated among the basic service tier and each tier of cable programming service. This Report and Order amends the rule to require that, in addition to the basic and cable programming service tiers, cable operators shall allocate costs to nonregulated programming service activities, other cable

---

[460] California Cable Comments at 69.

[461] Small Systems Comments at 39-42. Such a model, it suggests, should be developed by the Commission and should be computerized.

[462] BellSouth Comments at 22. Noting that the rule is limited to "cable operators for which the basic service tier is regulated ... or ... for which a complaint has been filed... ," BellSouth urges that it is impossible to predict which operators may file cost-of-service showings and which operators will be subject to complaints. Unless the financial records are maintained in accordance with GAAP and the cost allocation requirements of Section 76.924, it may be impossible to reconstruct the data to resolve cost-of-service showings or complaints, BellSouth asserts.

[463] Bell Atlantic Reply at 6-9 (parity of treatment for telephone companies and cable operators will promote competition between the converging industries).

activities, and non-cable activities.[464]

238. Accordingly, as we proposed in the Notice, we are requiring that, after revenues and costs are identified at the appropriate organizational level(s),[465] cable operators shall allocate costs among the equipment basket[466] and the following service cost categories: basic service,[467] cable programming services,[468] nonregulated cable programming services,[469] other

---

[464] See Section 76.924(e).

[465] As stated above, cable operators may aggregate all amounts associated with each revenue and cost category in Attachment B at the franchise, system, regional and/or company level, depending upon the organizational level at which the operator aggregated revenues and costs for accounting purposes as of April 3, 1993. See part V. supra.

[466] 47 C.F.R. § 76.923(d).

[467] 47 C.F.R. § 76.901(a) defines basic service as follows:

> The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the cable system), any public, educational, and governmental programming required by the franchise to be carried on the basic tier, and any additional video programming signals a service added to the basic tier by the cable operator.

By this Report and Order, we require that the basic service cost category include only allowable costs as defined by Sections 76.922(e) through (g) of our new rules.

[468] 47 C.F.R. § 76.901(b) defines cable programming services as follows:

> [A]ny video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than:
>
> (1) Video Programming carried on the basic service tier as defined by this section;
>
> (2) Video programming offered on a pay-per- channel or pay-

cable activities[470] and non-cable activities.[471] These allocations shall be used for cost-of-service showings and for allocating external costs.[472] For the purpose of allocating their costs and revenues among the service cost categories and the equipment basket in cost-of-service proceedings, cable operators shall use

---

per-program basis; or

(3) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shfited basis so long as the combined service:

(i) Consists of commonly-identified video programming; and

(ii) Is not bundled with any regulated tier of service.

By this Report and Order, we require that the cable programming services cost category include only allowable costs as defined by §§ 76.922(e) through 76.922(g) of our new rules.

[469] Nonregulated cable programming service is video programming that is not carried on either the basic service tier or a cable programming service tier. It includes video programming that is offered on a pay-per-channel basis, on a pay-per-program basis, or as any combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis as long as the combined service consists of commonly-identified video programming and is not bundled with any regulated tier of service.

[470] Other cable activities include all cable services that are not included in the basic service, cable programming services, or nonregulated cable programming services categories. Other cable activities includes leased commercial access, billing and collection services, studio and nonregulated equipment engineering and rental services, sale of nonregulated equipment, and maintenance of nonregulated equipment sold to customers.

[471] The non-cable service cost category shall include all activities of a cable operator that are not related to the provision of cable services.

[472] See part VII. infra regarding external costs.

FCC Form 1220 or FCC Form 1225.[473]

239. We also require that, to the extent possible, all costs be directly assigned among the equipment basket and the service cost categories.[474] In making this determination, we are modifying the existing requirement that, with a few exceptions, cost categories identified at the franchise level be generally allocated to the basic tier based on the ratio of channels in the basic tier to the total number of channels offered in the franchise area and that costs allocated to each tier of cable programming be based on the ratio of channels in each cable programming services tier to the total number of channels offered in the franchise area.[475] We find that when direct assignment is possible, it is preferable to a standard allocator because, while cost allocation provides an estimate of the origination of certain costs, direct assignment more accurately reflects cost causality.

240. For those costs that cannot be directly assigned, cable operators shall allocate such costs among the service cost categories and the equipment basket through methodologies that are consistent with the procedures in Section 76.924(f)(5) of our rules.[476] The Commission and local franchising authorities will

---

[473] Small cable system operators shall use FCC Form 1225. All other cable system operators shall use FCC Form 1220.

[474] Direct assignment applies when costs are incurred exclusively to support the equipment basket or a specific service cost category. For example, most programming charges from program suppliers relate to specific programming. Those charges should, therefore, be directly assigned to the tier on which the programming is offered.

[475] As stated below, however, where direct assignment is not possible, cable operators shall propose cost allocation methodologies that are consistent with § 76.924(f)(5) of the Commission's rules. We note that the allocation procedures required in § 76.924(f)(5) may, under certain circumstances, permit allocations on a per channel basis.

[476] These procedures require that, when direct assignment is not possible, operators must first attempt to allocate such costs through direct analysis of the origin of the costs. 47 C.F.R. § 76.924(f)(5)(i). Direct analysis could be applied effectively where records are maintained in such a manner that analytical procedures would allow for a determination of cost causality. For example, wages expense for equipment installers may not be accounted for on the basis of activities or functions, but the

review the allocators proposed by cable operators on a case-by-case basis and determine whether the allocators achieve reasonable results.[477] We agree with those commenters who suggest that we should be cautious at this time in adopting specific allocators or rigid cost allocation schemes.[478]

---

underlying payroll records or a time study may indicate the activities on which the installers spent their time. Such analysis, therefore, may allow for allocation of installers' wages expense on the basis of labor hours.

In addition, our rules contintue to require that, where direct analysis is not possible, operators must attempt to establish cost-causative linkage to other costs directly assigned or allocated by direct analysis. 47 C.F.R. § 76.924(f)(5)(ii). In this case, for example, the costs associated with the vehicles, tools and equipment used only by the installers might appropriately be linked to the installers' activities or functions, and allocated on the basis of the installers' labor hours. Costs associated with labor and equipment that support the installers and other groups might be allocated on the basis of the groups' collective labor hours.

Finally, where no direct or indirect linkage can be made, our rules contintue to require operators to allocate on the basis of the totals of all costs directly assigned and allocated using direct analysis and indirect linkage. 47 C.F.R. § 76.924(f)(5)(iii). Thus, the residual amounts that cannot be directly assigned or allocated by direct analysis or indirect linkage shall be allocated to each category based on the ratio of all other costs assigned and allocated to the category over the total of all costs directly assigned and allocated by direct analysis and by indirect linkage.

[477] It should be noted that there is substantial support for this approach in the record as numerous commenters recommended that cable operators be allowed to support their allocation methods on a case-by-case basis. See, e.g., Cablevision Systems Comments at 37-38, 51-54; Continental Comments at 77-81; TCI Comments 51-56; COA Comments at 87-91; Georgia Cable Comments at 34; Medium Operators Comments at 25-28; NCTA Comments at 27-29; Arthur Andersen Comments at 35-36.

[478] See, e.g., NCTA Comments at 27-29; TCI Comments at 51-56. We do not agree, therefore, with CFA's recommendation that we use a tier neutral allocator on the basis of channels as a starting point. CFA Comments at 6. We believe that it is far

241. For the purpose of establishing costs at the franchise level, we will maintain the current requirement that cable operators allocate costs that were identified at higher levels to the franchise level on the ratio of the total number of subscribers at the franchise level to the total number of subscribers served at the higher level.[479] We amend our rules, however, to specify the particular procedures that must be followed for allocating costs to the franchise level. First, recoverable costs that have been aggregated at the highest organizational level at which costs have been identified shall be allocated to the next (lower) organizational level at which recoverable costs have been identified on the basis of the ratio of the total number of subscribers served at the lower level to the total number of subscribers served at the higher level.[480] Second, this procedure shall be repeated at every organizational level at which recoverable costs have been identified until all costs have been allocated to the franchise level.[481]

VII. Accounting and Cost Allocation Requirements for External Costs

i. Background

242. Our current accounting and cost allocation rules[482] apply to cable operators seeking adjustments for changes in their external costs[483] as well as to cable operators that elect cost-

---

better policy to use a flexible approach to cost allocation as a starting point. If the need arises, we can consider the adoption of specific allocators after we have developed further knowledge and expertise under a flexible approach.

[479] Section 924(e)(1) currently provides that "[f]or the purposes of establishing expenses at the franchise level, cable operators shall allocate expenses and revenues aggregated at higher levels to the franchise level based on the ratio of the total number of subscribers served at the franchise level to the total number of subscribers served at the higher level." 47 C.F.R. § 924(e)(1).

[480] See Section 922(g)(1).

[481] See Section 922(g)(3).

[482] See 47 C.F.R. § 76.924.

[483] External costs are categories of costs that cable operators may pass through to subscribers without a cost-of-service under our price cap rules. Such costs include

of-service regulation. These rules also contain specific accounting and cost allocation requirements for certain external costs. First, the following external costs must be identified at the franchise level: franchise requirements, franchise fees, local taxes, and local programming. Second, costs of programming and retransmission consent fees must be allocated to the tier on which the programming or broadcast signal is offered. Third, franchise fees must be allocated among the programming service tiers, the equipment basket, and subscribers, in a manner that is most consistent with the methodology of the assessment of the franchise fees by local authorities. Fourth, the costs of public, educational, and governmental access must be directly assigned to the basic service tier where possible.

In the Notice, we sought comment on whether any proposals for changes to the accounting and cost allocation requirements applicable in cost-of-service proceedings should be also applied to external costs.[484]

ii. Comments

243. BellSouth argues that the allocation requirements outlined in the Notice should be extended to external costs.[485] Georgia Cable opposes applying the proposed accounting and cost allocation requirements to the development of external costs on the grounds that these costs are specific to the franchise or system.[486] New Jersey, however, urges that the basic cost-of-service principles be applied uniformly to all costs, including external costs in cost-of- service filings.[487]

iii. Discussion

244. We believe that franchising authorities and this Commission must be able to ascertain readily the bases for proposed external cost adjustments in order to be able to

---

retransmission consent fees, other programming costs, taxes, franchise fees, and costs of other franchise requirements. See 47 C.F.R. § 76.922(d)(2).

[484] See Notice at ¶¶ 57-65. For a discussion of these proposals, see part VI. supra.

[485] BellSouth Comments at 24.

[486] Georgia Cable Comments at 41 (aggregating or averaging external costs would be both unnecessary and burdensome).

[487] New Jersey Comments at 12.

effectively implement rate regulation of cable service. We will, therefore, apply to external cost calculations the changes to the accounting and cost allocation rules that we adopt in this Report and Order.[488] Thus, we will continue to require that the following external costs be identified at the franchise level: franchise requirements, franchise fees, local taxes and local programming. For all other external costs, we will continue to require that cable operators identify such costs at the franchise, system, regional and/or company level, depending upon the organizational level at which they identified costs for accounting purposes as of April 3, 1993. These costs shall be identified on FCC Form 1210 and on our cost of service forms. Moreover, after external costs have been identified at the appropriate organizational level(s), cable operators shall allocate such costs among the service cost categories and the equipment basket in the manner specified for cost-of-service showings.

245. With respect to the specific requirements for allocating certain external costs, we will continue to require that the costs of programming and retransmission consent be allocated to the service cost category on which the signal or programming is offered.[489] We also will continue to require that the costs of public, educational, and governmental access channels carried on the basic tier be directly assigned to basic service cost category where possible.

246. We will modify, however, the allocation requirements for franchise fees. Under the current rule, "franchise fees

---

[488] See parts V. and VI. supra. These requirements include use of the summary accounting list adopted here, and allocation to the specified categories. In the Further Notice, we are seeking comment on whether we should require cable operators that seek an adjustment for external costs to comply with the uniform accounting system that we are proposing here for cable operators that elect cost-of-service regulation.

[489] In light of our decision to adopt service cost categories, we have replaced the phrase "tier on which the programming or broadcast signal at issue is offered" with the phrase "service cost category in which the programming or broadcast signal at issue is offered." See Section 76.924(f)(1)(emphasis added). We find that this minor modification will have no practical effect on the application of this rule because the basic tier is equivalent to the basic service cost category and the cable programming service cost category contains subcategories representing each tier of programming in this category.

shall be allocated among equipment and installations, program service tiers and subscribers in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities."[490] We find that while the franchise fee should be allocated among the equipment basket and the service cost categories as the rules currently require, the rules should not list subscribers as a category in which such costs should be allocated. We find that the equipment basket and the service cost categories are the only appropriate categories for allocation purposes. It should also be noted we already require that the cost of franchise fees be identified at the franchise level.

247. We also shall modify existing rules to require that, to the extent possible, all external costs be directly assigned among the service cost categories.[491] For those external costs that cannot be directly assigned, we require that cable operators propose specific allocators that reasonably allocate costs among the service cost categories and the equipment basket.[492]

248. For the purpose of establishing external costs at the franchise level, we will retain the current requirement that cable operators allocate costs that were identified at higher levels to the franchise level on the ratio of the total number of subscribers at the franchise level to the total number of subscribers served at the higher level. We are amending our rules, however, to specify the particular procedures that must be followed for allocating costs to the franchise level[493] and these procedures shall apply to cable operators seeking adjustments to external costs as well as operators electing cost of service regulation.

VIII. Affiliate Transactions

---

[490] Consistent with our treatment of Section 76.924(f)(1), we have replaced the phrase "program service tiers" with the phrase "service cost categories." See Section 76.924(f)(2).

[491] As noted above, we find that when direct assignment is possible, it is preferable to a standard allocator because it is simpler to apply and it more accurately reflects cost causality.

[492] The Commission and franchising authorities shall review the allocators proposed by cable operators on a case-by-case basis and determine whether the allocators achieve reasonable results.

[493] See part VI, supra.

i. Notice

249. In the Notice, we stated that we would adopt rules to prevent cable operators from imposing the costs of nonregulated activities on regulated cable subscribers through improper cross-subsidization.[494] We proposed that these rules include rules for valuing transactions between regulated and nonregulated portions of cable systems, and we invited comment on specific valuation methods. In particular, we invited comment on whether we should require cable operators to record affiliate transactions at prevailing company prices offered in the marketplace to third parties, whenever the supplying affiliate has established such prices. We also invited comment on whether we should require cable operators to record each affiliate transaction at the higher of net book cost and estimated fair market value when the regulated cable system is the seller, and at the lower of net book cost and estimated fair market value when the regulated cable system is the buyer.

250. We proposed that the valuation methods we adopt for affiliate transactions govern the amounts cable operators may include in rates based on cost-of-service showings.[495] In addition, we tentatively concluded that those methods should apply to the programming transactions of cable operators that do not elect cost-of-service ratemaking. We noted that, in establishing our benchmark methodology, we had limited the pass-through of affiliate programming charges to no more than inflation. We sought comment on whether we should employ the affiliate transactions requirements we adopt in this proceeding instead of, or as alternatives to, that inflation-based limitation.[496]

251. We further proposed in the Notice to define affiliate as including any entity having a five percent or greater ownership interest in the cable company.[497] We proposed to include within the scope of our affiliate transaction rules those transactions that occur between regulated and nonregulated

---

[494] Notice at ¶ 67-69.

[495] Id. at ¶ 67.

[496] Id. at n.70.

[497] Id. at n.67. In the Rate Order, we adopted a five percent threshold in defining affiliate for purposes of determining the extent to which cable operators could pass programming charges through to ratepayers. 8 FCC Rcd at 5788, n.601.

portions of the same cable company as well as transactions between separate companies.

252. Subsequently, in the First Reconsideration Order in MM Docket No. 92-266, we modified our external cost requirements to permit cable operators to pass through as external costs the costs of affiliated programming that exceed inflation as long as the prices charged the affiliate reflect either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of such programming.[498] We stated, however, that we would further examine and refine our treatment of affiliated programming costs for external cost purposes in this proceeding.

ii. Comments

253. Cable operators generally maintain that they should be allowed to record purchases at the prices at which the providing affiliate sells to third parties. TCI observes that the Commission has allowed telephone companies to record affiliate transactions at such prevailing company prices. TCI states that similar treatment should be accorded cable companies because all affiliated programmers offer and sell their products to third parties.[499] Cablevision Industries and Viacom oppose the imposition of affiliate transaction rules and argue that there is no history of abuse in this area.[500] Small Cities suggests that the Commission allow management fees between cable operators and affiliates where the amounts charged can be shown to be customary and reasonable for transactions between third parties at the time

---

[498] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, First Order on Reconsideration, 58 Fed. Reg. 43853 (Sept. 2, 1993) (First Reconsideration).

[499] TCI Comments at 58-59.

[500] Cablevision Industries Comments at 57-60; Viacom Comments at 57-60. These commenters agree, however, that if the Commission does impose such rules, cable operators should be allowed to record purchases at prevailing company prices. Absent such a methodology, they contend, cable operators should be allowed to provide evidence as to market prices by submitting the prices paid by an entity for the same or similar service or product from an independent supplier.

of the agreement.[501]

254. Cablevision Industries and Viacom also maintain that the Commission already resolved the valuation issue in the First Reconsideration in MM Docket No. 92-266.[502] This rule should apply, they assert, for purposes of setting rates under both the cost of service and the benchmark approach. These commenters argue that application of the prevailing market approach would retain all of the benefits inherent in vertical integration, but would still ensure that costs are market-based and not artificially inflated.

255. NCTA states that affiliate transaction rules for cable are not necessary at this time. NCTA claims that, unlike telephone companies, cable operators generally are not affiliated with vendors of equipment and other items except programming.[503] NCTA also states that there is no history of cable operator cross-subsidization and no evidence that such is to be expected. If a pattern of problems does develop, the Commission can adopt narrow rules to address the abuses, according to NCTA.

256. Bell Atlantic states that cable operators should be required to record affiliate transactions according to the same rules that apply to telephone companies.[504] The need to prevent operators from shifting profits upstream by paying inflated prices to programming affiliates is heightened, Bell Atlantic claims, by the Commission's ruling that affiliate programming costs are external costs that can be passed through to subscribers. Bell Atlantic further observes that cable operators acknowledge that they are upgrading their systems to provide

---

[501] Small Cities Comments at 34; see also Time Warner Comments at 39-40.

[502] Cablevision Industries Reply at 7-8; Viacom Reply at 14-15 (contending that in allowing the limited pass through of affiliated programming costs in that proceeding, the Commission concluded that those costs should not be deemed unreasonable per se, but should be compared to prevailing company prices or fair market value).

[503] NCTA Comments at 42.

[504] Bell Atlantic Comments at 16-17. These rules are codified at 47 C.F.R. §32.27. Bell Atlantic responds to cable operator objections that there is no evidence of abuse by cable operators, by arguing that such rules are not intended to be punitive but are designed to ensure that excessive payments to affiliates are not used to justify excessive rates.

telephone and other advanced services, not just cable services. Bell Atlantic claims that as long as cable operators are not covered by the rules that apply to telephone common carriers, cable operators will be free to use revenues extracted from their regulated cable customers to pay for the improvements to provide telephone services. Requests to delay implementation of affiliate transaction rules, Bell Atlantic maintains, are transparent efforts to preserve cable's existing competitive advantage.[505]

257. BellSouth argues that cable operators should be allowed to record affiliate transactions at the prices affiliates charge third parties. Otherwise, BellSouth states, the transactions should be recorded at the selling affiliates' fully distributed costs.[506] GTE also proposes that cable operators be subject to the same affiliate transactions rules as telephone companies, but recommends that the rules currently applicable to telephone companies be amended to allow all affiliate transactions to be recorded at fair market value.[507]

258. New Jersey claims that cable operators should record affiliate transactions in accordance with GAAP and that the burden of proof for affiliate prices should rest with the operators who have the relevant data.[508] Seaford supports a market-based approach that derives the price from the providing affiliates' recent sales to third parties, rather than from estimated fair market value.[509]

259. Municipals, NATOA, and Muzak support application of the telephone company rules to cable.[510] Additionally, NATOA responds to those who claim that affiliate transactions rules for cable are not necessary because there is no history of abuse. NATOA observes that, given the nature of cost-of-service showings and the preponderance of vertically integrated cable companies, cable operators will have an enormous incentive and opportunity

---

[505] Bell Atlantic Comments at 17-18; Bell Atlantic Reply at 9-11.

[506] BellSouth Comments at 25.

[507] GTE Reply at 33-34.

[508] New Jersey Comments at 10.

[509] Seaford Comments at 30.

[510] Municipals Comments at 28; NATOA Comments at 13; NATOA Reply at 6-7; Muzak Comments at 7.

to show inflated costs wherever possible. NATOA claims that implementation of rules similar to those required of telephone companies would protect subscribers from paying rates based on "phantom higher costs" with a minimum burden on cable operators.

260. A number of commenters criticize our proposal to use a five percent ownership interest as the threshold for defining an affiliate.[511] Some propose a twenty percent threshold, consistent with GAAP.[512] BellSouth asserts that an affiliate relationship exists when an entity is controlled by, or is under common control with, another entity.[513] Likewise, GTE observes that the five percent standard is too burdensome and recommends a twenty percent threshold.[514] Michigan Committee, however, supports the five percent rule, and maintains that the same standard is used for cellular and other common carrier services.[515]

iii. Discussion

261. In enacting the Cable Act of 1992, Congress intended to ensure that consumers pay reasonable rates for regulated cable

---

[511] See, e.g., BellSouth Comments at 24; Arthur Andersen Comments at 37; GTE Comments at 25; GTE Reply at 33-34.

[512] See, e.g., GTE Comments at 25; GTE Reply at 3-34. In instances of "significant influence," GAAP provides for special accounting for investments in affiliates using what is called the "equity method." This method requires adjustments to earnings to eliminate intercompany gains and losses from consolidated financial statements. Significant influence is assumed where and only where there is twenty percent or more ownership in the investment company, but the presumption can be overcome by predominant evidence to the contrary, i.e., that significant influence exists at a lesser level or that significant influence does not exist at or above the twenty percent threshold. See The Equity Method of Accounting for Investments in Common Stock, *Opinions of the Accounting Principles Board No. 18* (New York: AICPA, 1971); Criteria for Applying the Equity Method of Accounting for Investments in Common Stock, *Interpretations of the Financial Accounting Standards Board No. 35* (Stamford, Conn.: FASB, 1981).

[513] BellSouth Comments at 24.

[514] Arthur Andersen Comments at 37; BellSouth Comments at 25; GTE Comments at 25; GTE Reply at 33-34.

[515] Michigan Committee Comments at 21.

service.[516] We find that it would be inconsistent with this Congressional intent if we were to allow the rates for regulated cable service to reflect the prices affiliates charge each other for transactions that occur at other than arm's length. As we observed in proposing to strengthen our affiliate transactions rules for telephone companies, companies that are able to pass increases in their costs on to ratepayers may be motivated to pay excessive amounts for assets and services obtained from nonregulated affiliates.[517] In addition, companies may also have incentives to undercharge their nonregulated affiliates when the undercharges can be offset by increased charges to ratepayers.[518]

262. Therefore, we will adopt rules for affiliate transactions[519] that will apply to cable operators who either

---

[516] See Cable Act of 1992, Sections 623(b), (c), codified at 47 U.S.C. § 543(b), (c).

[517] Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates, Notice of Propose Rulemaking, CC Docket No. 93-251, 8 FCC Rcd 8071 (1993) (Telco Affiliate Transactions Notice).

[518] Id. We do not agree with those commenters who suggest that it is not necessary to adopt affiliate transaction rules because there is no history of cross-subsidization in the cable industry. See TCI Comments at 58-59; NCTA Comments at 42. We find that affiliate transactions rules are justified where, as here, there is a potential for cross-subsidization.

[519] See 47 C.F.R. § 924(i) in Attachment B herein. We are proposing modifications to these rules in the Further Notice, however, in order to consider applying to cable system operators the changes that we have proposed to the valuation methods for affiliate transactions that involve telephone companies. In the Telco Notice, we analyzed in detail the specific methods for valuing transactions between telephone companies and their affiliates: prevailing company pricing, estimated fair market value, and cost. We tentatively concluded in the Telco Notice that we should sharply curtail prevailing company pricing for transactions between telephone companies and their nonregulated affiliates. We also tentatively concluded that we should require telephone companies to value affiliate transactions for which we do not permit prevailing company pricing at the higher of cost and estimated fair market value when the telephone company is the seller, and at the lower of cost and estimated fair market value when the telephone company is the buyer. We believe that it may be in the public interest to apply to cable system operators the

elect cost-of-service regulation or seek to adjust benchmark/price cap rates for affiliated programming costs.[520] Under the rules we are adopting with this Report and Order, cable operators that elect cost-of-service regulation or who seek to adjust benchmark/price cap rates for affiliated programming costs shall be required to apply valuation methods that are similar to those telephone companies are now required to apply.[521] These methods distinguish between asset transfers and the provision of services.

263. When a cable operator sells assets to an affiliate or buys assets from an afiliate, the assets shall be valued at the asset provider's prevailing company price, if the provider has sold the same kind of asset to a substantial number of third

---

changes we have proposed for telephone companies and we, therefore, invite comment in the Further Notice on whether we should adopt affiliate transactions rules for cable similar to those we proposed for telephone companies.

[520] It should be noted that, for those operators electing to use our benchmark/price cap approach, the affiliate transaction rules will only be applicable to affiliate transactions involving programming. In Docket No. 92-266, we determined that, under price caps, cable operators may pass-through affiliated programming costs that exceed inflation as long as the prices charged to the affiliated cable system operators reflect either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of programming. First Order on Reconsideration at ¶ 114. We also stated that we would further examine this issue in the cost-of-service proceeding.

[521] It should be noted, however, that while the rules for telephone companies specify the manner of accounting for affiliate transactions, the affiliate transaction rules we are adopting for cable operators with this Report and Order do not impose accounting requirements. The affiliate transaction rules that we are adopting with this Report and Order merely set the limits for inclusion of investment and expense in rates set on a cost-of-service basis. They will also govern external cost treatment of programming cable operators purchase from affiliates.

Our proposal in Attachment C for an accounting system, however, proposes accounting requirements for affiliate transactions. The Further Notice seeks comment on all aspects of Attachment C, including the proposed requirements for affiliate transactions.

parties at a generally available price. Absent a prevailing company price, the cable operator shall value the asset at the higher of net book cost and estimated fair market value when the regulated cable system is the seller, and at the lower of net book cost and estimated fair market value when the regulated cable system is the buyer.

264. When a cable operator sells services to an affiliate or buys services from an affiliate, the services shall be valued at the provider's prevailing company price, if the provider has sold the same kind of service to a substantial number of third parties at a generally available price. When the provider has established no prevailing company price, the cable operator must value the service at the service provider's cost.

265. In determining the prevailing company price, we require that it be based on the price at which the provider has sold the same kind of asset or service to a substantial number of third parties at a generally available price. We do not adopt our proposal that an offer to sell will be sufficient to establish a prevailing company price because the price at which a company offers to sell a product or service to a third party will not necessarily reflect the price a third party would be willing to pay for an asset or service. We anticipate that affiliate transactions will usually be set at the prevailing company price, because the record indicates that affiliate transactions in the cable industry primarily involve purchases from affiliated programmers who sell the same products to third parties.[522]

266. In determining the cost of both assets and services, cable operators shall apply the costing methods and the rate of return this Order adopts for cable cost-of-service showings, to the extent applicable, and shall otherwise use reasonable costing methods. Where there is no prevailing company price, affiliate transactions must be carefully scrutinized to ensure that costs are calculated accurately and, for asset transfers, that fair market value is estimated properly. Therefore, cable operators must be prepared to demonstrate that any affiliated transactions costs they claim as regulated costs reflect the cost-of-service methodologies we adopt with this Report and Order.

267. For the purpose of evaluating affiliate transactions that involve programming, we shall classify programming as an

---

[522] NCTA states that, unlike telephone companies, the cable operators generally are not affiliated with vendors of equipment and other items except programming. NCTA Comments at 42. TCI states all affiliated programmers offer and sell their products to third parties. TCI Comments at 58-59.

asset. Hence, for the purpose of establishing initial costs for programming purchased by a cable operator from an affiliate, the cost of the programming shall equal the provider's prevailing company price, if the provider has sold the same kind of programming to a substantial number of third parties at a generally available price. Absent a prevailing company price, the cost of the programming shall equal the lower of the provider's net book cost and the programming's estimated fair market value.

268. Except to the extent that they are relevant for estimating fair market value, we will not allow the establishment of affiliate prices by reference to the prices independent suppliers charge third parties for the same or similar products. The difficulty of establishing comparability of assets, products, and services creates an inherent problem for a methodology that bases affiliate prices on prices that independent suppliers charge to third parties. This is particularly the case when the product is programming. What may appear comparable from a production viewpoint, for example, may in no way be comparable from the perspective of the program viewer. Thus, a low-cost production that provides the producer with a high price on the basis of high viewer demand may not be comparable to a similarly low-cost production with little viewer demand.

269. We will apply our rules adopted in the program access proceeding to define affiliated programmers.[523] Under those rules, an affiliated programmer is a programmer with an ownership interest of five percent or more, including general partnership interests, direct ownership interests, and stock interests in a corporation where such stockholders are officers or directors or who directly or indirectly own five percent or more of the outstanding stock, whether voting or nonvoting. Such interests include limited partnership interests of five percent.

270. We find that a five percent ownership interest provides a reasonable threshold because it ensures that affiliate transaction rules do not apply where the ownership arrangement between a cable operator and another company is de minimis. At the same time, it ensures that affiliate transaction rules apply where there is clear potential for cross-subsidization. Accordingly, we do not agree with those parties who suggest that

---

[523] See Rate Order, 8 FCC Rcd at 5788, n.601, citing Implementation of Sections 12 and 19 of the Cabale Television Consumer Protection and Competition and Diversity Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, FCC 93-178, released April 30, 1993; 47 C.F.R. § 76.1000(b).

a 20 percent threshold is appropriate.[524] We find that 20 percent ownership exceeds the minimum level at which a cable operator and an affiliate may have an incentive to engage in cross-subsidization. We find that the issue is not whether the cable operator controls the affiliate, the affiliate controls the cable operator, or the cable operator and the affiliate are under common control; the issue is whether an affiliate relationship is significant enough to create a possible incentive for cross-subsidization.[525]

271. Finally, we expect cable operators to provide detailed disclosure of affiliate transactions so that the Commission and franchising authorities can ensure that affiliate transactions are treated in a manner consistent with the limits of this Report and Order. Where cable operators have not demonstrated that their affiliate transactions meet the requirements of our affiliate transaction rules, disallowances shall be made by the Commission and franchising authorities.

IX. Streamlined Filing and Review

A. Small Systems

i. Notice

272. In the Notice, we solicited comment on whether we should modify for small systems any proposed cost-of-service requirements, and if so, what modifications we should make.[526] We specifically sought comment on whether we should adopt streamlined alternatives for small systems. We also asked whether small systems means systems serving 1,000 subscribers or fewer, whether or not these systems are controlled by large MSOs, or whether some other definition was more appropriate.

---

[524] See, e.g., part III., supra.

[525] For purposes of eligibility for transition relief, and administrative relief for small systems, we have established a 20 percent affiliation threshold. Benchmark Order at II.B.4.b. These thresholds were appropriate because we were concerned not with incentives for cross-subsidization, but with overall financial relationships that could make it inappropriate for the regulated system to be eligible for transition relief or administrative relief. A five percent limit would unnecessarily restrict eligibility for transition relief.

[526] Notice at ¶¶ 76-78.

ii. Comments

273. Many of the commenters, stating that the proposed cost-of-service requirements do not reduce administrative burdens for small systems, suggest other methods for reducing such burdens. For example, some commenters propose more generous benchmarks. California would allow systems with 5,500 subscribers or less up to 20 percent flexibility with the benchmark formula before a cost-of-service showing is required.[527] NY Commission argues that small systems and franchise authorities should be permitted to decide among per-channel benchmark rates for systems with fewer than 1,000 subscribers.[528] NCTA would allow small systems to increase their rates to the benchmark cap and to pass through rebuild costs.[529]

274. Several commenters propose the creation of a special advisory group or program within the Commission that would develop an average cost schedule for small systems and assist them with cost-of-service showings.[530] The SBA argues that we should require that large MSOs show administrative hardship in the operation of their small systems before they can join such a program.[531] Small Systems describes how its model forms could be used for small systems' cost-of-service showings.[532]

275. Other proposed methods for reducing the burden on small systems include: the establishment of a programming pool to equalize the purchase price between large and small, and urban

---

[527] California Comments at 73-74.

[528] NY Commission Comments at 4.

[529] NCTA Comments at 33-34 (contending that pricing flexibility will help generate necessary capital, and noting that Congress and the Commission have long advocated special regulatory treatment to provide state-of-the-art technology to rural subscribers).

[530] California Comments at 74; Small Cities Comments at 4; SBA Comments at 21-24; Small Cable Reply Comments at 32.

[531] SBA Comments at 24.

[532] See Small Systems Comments at 38-41, Exhibits 1 and 2 for a detailed description of the cost-of-service models developed by Small Systems' consultant, Anthony Kern of Arthur Anderson & Company. These forms allow small systems to input various components of the ratemaking formula, i.e., operating expenses, ratebase, and rate of return.

and rural, systems;[533] providing subsidies and revenue supports to small systems akin to those provided by Congress, the Commission, and state regulators to rural telephone companies for their high costs;[534] adoption of a simplified accounting approach similar to Class B telephone company accounts;[535] the negotiation of basic service rates;[536] the adoption of a simple income statement approach;[537] and the establishment of a liberal waiver policy for provisions imposing undue costs or burdens on small systems.[538]

276. Several parties comment on the feasibility of the proposed general streamlined measures for small systems' cost-of-service showings.[539] SBA supports the benchmark plus significant capital improvement approach.[540] Some commenters emphasize that the key to streamlining cost-of-service showings for small systems is to identify the unique characteristics and costs associated with such systems, i.e., higher costs for capital, wiring, and programming.[541] SBA opposes the 1986 adjusted rate approach for small systems, arguing that the 1986 rates resulted

---

[533] Small Cities Comments at 7.

[534] Id. at 8.

[535] BellSouth Comments at 32.

[536] NTCA Comments at 2-3; NY Commission Comments at 3.

[537] Tele-media Comments at 19.

[538] NTCA Comments at 3.

[539] Austin Comments at 14; SBA Comments at 19-24; BellSouth Comments at 32; Small Cable Reply Comments at 4, 28.

[540] SBA Comments at 20-21 (arguing that such an approach is necessary for small systems to stay competitive with other multichannel video delivery systems, to satisfy customers' desires, and to include rural Americans in the telecommunications infrastructure of the next century); see also Small Cities Comments at 32-33.

[541] SBA Comments at 19-20; Small Cable Reply at 32-33. Although these commenters do not specify whether such factors should be added to the benchmark formula, they do support a simplified showing which includes these costs.

from franchise bidding wars and did not reflect economic reality.[542] Small Cable supports the 1986 adjusted rates approach but with no productivity offset for small systems.[543] Pegasus supports its safe harbor formula for small systems, contending that this formula allows small system operators to raise cost-based rates to a formula-derived level without full cost-of-service showings.[544]

iii. Discussion

277. The Cable Act of 1992 directs us to reduce the administrative burdens of, and costs of compliance with, our cable regulations for small cable systems.[545] We are adopting an abbreviated cost of service form for use by small systems. We believe this will reduce the administrative burdens of cost showings for small system operators, while retaining the necessary regulatory oversight and assurance of reasonable rates. We will require that the information provided on the abbreviated cost of service form be certified by the operator as correct; it will be subject to audit by the local franchising authority and by the Commission.

278. Consistent with our eligibility standards for small system administrative relief, independent small systems and small systems operated by small MSO's may use this form.[546] Small MSO's are those multiple system operators that (1) serve 250,000 or fewer subscribers, (2) own only small systems with less than 10,000 subscribers, and (3) have an average system size of 1,000 or fewer subscribers. This is the same standard of eligibility that we adopt for other small system administrative relief.[547]

---

[542] SBA Comments at 17-18. SBA also contends that the 1986 rates do not reflect the technological advances and rebuilds of systems.

[543] Small Cable Reply Comments at 31-32.

[544] Pegasus Reply at 4-7. Pegasus urges that the formula combines the FCC-determined values for operating expense per customer, technical costs per cable mile, plant cost per mile, headend cost per channel and life of plant with the system operator's actual number of subscribers, plant miles, remaining life of plant, and number of regulated channels to determine the revenue requirement per channel.

[545] 47 U.S.C § 623(i).

[546] Benchmark Order at II.D.1.

[547] See Benchmark Order at II.D.1.

Use of this form will not be available for small operators affiliated with larger systems.[548]

279. While we believe that all cable companies that choose to make cost-of-service filings should be subject to the uniform accounting requirements we propose here, at least in abbreviated form, we acknowledge commenters' argument that such accounting requirements may increase the administrative burden on small operators to the point of hardship, and that small operators are unlikely to require the same level of regulatory oversight as larger entities. Thus, in our Further Notice, we solicit comment on whether we should exempt small systems and/or small operators from these requirements entirely. We also adopt reduced accounting requirements for small systems.[549]

B. Network Upgrades

i. Notice

280. In the Notice, we sought comment on establishing an abbreviated cost-of-service alternative for significant prospective capital expenditures used to improve the quality of service or to provide additional services.[550] Under this approach, operators seeking to raise rates to recover the costs of a planned upgrade would submit only the costs of the upgrade instead of all current costs. If otherwise in accordance with cost-of-service requirements, the costs of the upgrade would then be added to the rates permitted under the benchmark and price cap approach to the extent these costs could not be recovered under that approach. We stated that any cost recovery must comply with our cost allocation requirements, to ensure that only the costs allocable to regulated services are imposed on subscribers to

---

[548] We adopt the same affiliation standards that we employ for small system administrative relief generally. We will not permit use of the small system relief form by companies in which a larger company holds more than a 20 percent equity interest (active or passive) or over which a larger company exercises actual working control (such as through a general partnership or majority voting shareholder interest). See Benchmark Order at II.B.4.b. This affiliated standard will also govern eligibility for the use of the abbreviated summary level accounts for small systems.

[549] See Accounting Requirements, part V. supra.

[550] Notice at ¶¶ 72-73.

those services.[551]

ii. Comments

281. Cable operators commenting on this approach generally express a preference for passing through the cost of system upgrades as external costs.[552] They indicate, however, that in the alternative, an abbreviated approach would be acceptable.[553] Comcast, for example, states that if the Commission decides not to permit system improvement costs to be passed through, it should adopt a "middle tier" or "abbreviated" showing for operators to justify the costs associated with system upgrades that would not discourage operators from investing in newer technologies to improve service to customers.[554] Georgia Cable strongly supports an abbreviated approach, based on its observation that the benchmark and price cap framework does not include system upgrades and service improvements. It agrees with the Commission's proposal to add the cost of an upgrade to the benchmark rate subject to the cost allocation rules adopted by the Commission.[555]

282. NATOA supports the objective of an abbreviated cost-of-service showing for significant prospective capital expenditures, but not in the form proposed, which it believes has a number of pitfalls. The most serious difficulty, according to NATOA, is that the proposed approach does not take into account the possibility that operators are unable to recover upgrade costs because the operators are inefficient or because the costs are frivolous or otherwise unjustified.[556] Local governments state that they might support this approach, but only for rates that will not be effective until the system upgrade is completed

---

[551] Notice at ¶ 75.

[552] See, e.g., Medium Operators Comments at 12; Continental Comments at 94.

[553] See, e.g., COA Comments at 101; TMC Comments at 19; Small Cities Comments at 36; NCTA Comments at 36; Comcast Comments at 42-43; Georgia Cable Comments at 38; see also Corning Reply Comments at 6.

[554] Comcast Comments at 42-43.

[555] Georgia Cable Comments at 38; Corning Reply Comments at 6.

[556] NATOA Comments at 4, 15. NATOA believes the proposal requires significant further study to ensure it is not abused.

and operational.[557]

283. BellSouth opposes a capital improvement add-on for four reasons. First, it believes that benchmark rates already reflect the rapid capital recovery employed by the cable industry in an unregulated environment, thereby providing cash flow to cable operators to reinvest in system upgrades; second, it asserts that most system upgrades should be recovered through depreciation expenses; third, it argues that competitive parity requires that depreciation expense for cable operators be treated as it is in the local telephone exchange carrier price cap plan, as an "endogenous" cost included in the benchmark; and fourth, it concludes that the cost-of-service approach would not provide significant administrative savings because it would require regulators to examine not simply the cost of the upgrades, but also the benefit to the cable operator in the form of reduced expenses and additional revenues.[558]

284. In reply, Corning endorses the abbreviated filing approach. It contends that the benchmark/price cap mechanism would typically fail to permit the full recovery of capital investment in upgrades and rebuilds, and that the streamlined cost-of-service mechanism would appear to offer the only means by which the Commission can spare regulators and cable operators the burden of full cost-of-service proceedings every time an operator wishes to rebuild or upgrade its system.[559]

iii. Discussion

285. We conclude that an abbreviated cost-of-service showing for network upgrades, with safeguards, provides an appropriate way to implement the goals of the Cable Act of 1992, to promote the availability of diverse cable services and facilities, encourage economically justified upgrades, and reduce

---

[557] Utah Comments at 24; Michigan Comments at 24 (both asserting that the operator should not be able to increase its rates until the improvement is providing a benefit to subscribers).

[558] BellSouth Comments at 30-31.

[559] Corning Reply at 4-8. Corning suggests that an add-on to per-channel rates could be calculated based on the incremental cash flow necessary to support the upgrade and the cost of capital to finance the investment, including a reasonable rate of return. The cable operator would be obligated to present its underlying calculations and rationale to the reviewing body upon request.

regulatory burdens, while ensuring reasonable rates for regulated services.

286. For many systems, this option will be unnecessary or inapplicable. The benchmark/price cap mechanism is already based on the rates of competitive systems, including those with upgraded networks. The rates charged by those systems presumably recover their capital costs. The benchmark also includes factors reflecting the number of channels a system furnishes to customers. Nevertheless, there may be cases where the benchmark rates do not provide sufficient revenue to attract capital for upgrades because of unusual costs associated with capital improvements. For these cases the abbreviated cost-of-service showing should provide the ability to attract the capital needed for the upgrade.

287. While we understand NATOA's and BellSouth's concerns that the abbreviated approach might be abused or that the add-on rate might not be needed, we believe these concerns can be addressed while still expediting rate increases needed to pay for worthwhile upgrades. First, this option will be available only for significant upgrades requiring added capital investment, such as expansion of band width capacity and conversion to fiber optics, and for system rebuilds. Normal improvements and expansions of service will remain subject to the usual rate review process. Second, to justify an increase in the rates for regulated services, the operator will be required to demonstrate that the capital investment actually will benefit subscribers through improvements in the regulated services subject to the rate increase. This requirement will help assure that operators do not abuse the abbreviated filing option by requiring regulated service customers to pay higher rates to fund upgrades that actually only benefit other services.

288. Third, as suggested by the Municipalities, we agree that, except to the extent provided by our AFUDC policy, the upgrade rate increase should not be assessed on customers until the upgrade is complete and providing these benefits to customers of the regulated services. This is consistent with the general cost-of-service standard that only used and useful property should be included in the ratebase. Any costs that are not used and useful, such as the frivolous or inefficiently incurred costs cited by NATOA, will be deducted from total cost. We anticipate that issues of allowable costs can be resolved if raised by comparison with costs of similar systems and, in particular, systems subject to competition.

289. Fourth, to assure that the upgrade rate increase is justified by higher costs, the operator will bear the burden of demonstrating the amount of the net increase in costs, taking

into account current depreciation expense, likely changes in maintenance and other costs, changes in revenues, and expected economies of scale. And fifth, as we said in the Notice, the operator must also allocate the net increase in costs in conformance with the cost allocation rules for cost-of-service showings, to assure that only costs allocable to regulated services are imposed on subscribers to those services.

290. Based upon this showing of the net increase in allowable costs associated with the capital improvement, the operator would be permitted to set a rate based on two elements. The first element is the benchmark rate, as governed by the Rate Order and the price cap. The second element will be the capital improvement add-on. The sum of these two elements will yield the maximum allowable rate that might be charged to subscribers. The capital improvement add-on will not be adjusted for inflation but will be a fee charged over the useful life of the improvement determined in accordance with our cost-of-service requirements.

291. As part of our collection of forms for operators' cost-of-service showings, we will also develop forms for the abbreviated showings associated with network upgrades. We delegate to the Cable Services Bureau the development of appropriate forms for these abbreviated showings.

X. Hardship Rate Relief for Operators

292. Some cable operators urge that to ensure the continued growth of the cable industry, while conforming with the Cable Act of 1992 and the Fifth Amendment, the cost-of-service rules must be tailored to the economic and financial requirements of that industry.[560] We believe that the combination of the benchmark/price cap mechanism with the cost-of-service backstop will in fact provide a workable and effective approach that recognizes both the requirements of the industry and the rights of customers, especially in combination with the abbreviated filing option, experimental incentive plan, and average cost approaches we have established or are seeking to develop. Thus, we believe our rules respond to these concerns. Nonetheless, we also recognize that, in extraordinary cases, the cable industry may face special problems as it moves into a regulated environment, and that it is conceivable that the particular circumstances of an operator could be such that the practical result of applying any of these rate options could still be to threaten the financial health of the operator and its continued ability to provide cable service.

---

[560] See, e.g., Cablevision Systems Comments at 4-18.

293. To address this possibility, the Commission will consider the need for special rate relief for operators in individual cases. To demonstrate eligibility for such extraordinary relief, the operator should establish that the rates permitted by the benchmark/price cap and cost-of-service mechanisms undermine the financial health of the operator so that it is unable to attract capital and maintain credit necessary to operate, despite prudent and efficient management. The operator should also establish that the resulting rates, though higher than those justified by the operator's costs, will nevertheless not be unreasonable or exploitative of customers. For example, the operator should demonstrate that the rates are not excessive in comparison with similarly situated systems, particularly systems subject to competition. Given the carefully balanced approach in our cost-of-service rules, it is extremely difficult for us to conceive of such a situation arising. Nevertheless, we believe cable operators should have the opportunity to attempt to make such a showing if they deem it warranted.

294. This hardship showing must be made for the MSO level, or in any event at the highest level of the operator's cable system organization. The operator should provide all information and legal authority on which it seeks to rely, and all factors it believes the Commission should consider, to demonstrate that the end result of the other ratesetting options available to it would place the operator in financial difficulty warranting rate relief, and that on balance this relief would not result in unreasonable rates for customers. If the operator makes an adequate initial showing of facts which, if proved, might warrant rate relief, we will subsequently provide the operator with an opportunity to prove the facts alleged and demonstrate that, balancing the relevant interests of investors and ratepayers, rate relief is warranted.

XI. Upgrade Incentive Plan

295. In the Cable Act of 1992, Congress set as one of its policy goals ensuring that cable operators continue to expand the capacity and programs offered over their systems, where economically viable.[561] In the Notice, we sought to develop methods to encourage cable operators to provide additional services and improve the quality of service, while reducing regulatory burdens. The specific method we suggested was to permit an abbreviated cost-of-service showing for rate increases associated with significant prospective capital expenditures. We have also established requirements for the showing for Network Upgrades, supra part IX.B. Upon further analysis and

---

[561] Cable Act, Section 3(b)(3).

consideration of the comments, however, we believe that the goal of promoting economically justified system upgrades, as well the goals of the Cable Act and of this proceeding, may also be furthered by development of an incentive regulation approach to upgrading cable services, similar to the incentive plans we have implemented for telephone carriers.

296. The basic outline of this approach would be to permit an operator to enter into a social contract with its customers under which the operator would be given substantial flexibility in setting rates for new regulated services it introduces, such as new service tiers offering additional program channels. In exchange, customers would be guaranteed that rates for current services would be kept stable and reasonable, no higher than rates before the contract takes effect or the benchmark/price cap rate (which might include adjustments for inflation and external cost changes), and that this rate would purchase at least the same program channels, or channels of equivalent value to customers. The operator would also commit to otherwise maintaining or improving its service quality. The contract would be effective for a term of years and would be overseen by this Commission, and reviewed before the end of the term.

297. A plan such as this, which protects the rates and quality of current cable service tiers, while providing profit incentives for operators to introduce new and improved regulated services, may help carry out the purposes of the Cable Act while also being fair to customers of current services, less burdensome on cable operators and those responsible for their regulation, and more likely to encourage worthwhile investments to upgrade cable service. Because this plan would also be more consistent with the incentive plans that this Commission applies to telephone companies, it may also help position us for the future, when it is quite possible that telephone and cable companies may be providing similar and competing services.[562]

298. This approach should generate a strong incentive for

---

[562] The intended effect is similar to that created in price cap plans by assigning groups of services with common characteristics to a basket, subject to a price cap index that is not generally affected by changes in the carrier's costs or by the costs and returns of other services. The price cap carrier is deterred from shifting costs from one basket to another basket of regulated servcies, or from unregulated services to price cap services, because it cannot increase rates in the basket. The carrier is encouraged, however, to seek the most efficient method of providing services within each basket, and to introduce new services provided they will be economically viable.

the operator to undertake only upgrades that are economically justified and that best meet customer needs, and to make such upgrades in the most efficient manner possible. In order to profit from the planned upgrade, an operator must provide customers with additional or upgraded services they want to buy. Marketplace forces, not this Commission, will determine which services succeed. This is so because the level of profits the operator can hope to achieve depends on the extent to which it can keep its costs below what customers are willing to pay. The greater the value for customers, and the lower the costs for the operator, the higher the profits the operator will be able to achieve.

299. We also anticipate that a properly designed incentive plan for system upgrades should help achieve other goals. It should, for example, help encourage operators to provide additional tiers of services. An incentive regulation plan should also reduce regulatory burdens, even below those likely under the add-on rate proposal. Under the Upgrade Incentive Plan, we would ordinarily expect to review only whether the operator is continuing to offer existing services at rates no higher and quality no lower than the operator contracted to provide. We would not expect to investigate complaints regarding rates for additional regulated services unless they were clearly outside a wide range of reasonable rates, as evidenced, for example, by similar systems.

300. We believe that offering substantial rate flexibility may also be appropriate to encourage operators to take the entrepreneurial risk of investing in the upgrades needed to offer such services, while replicating competitive marketplace forces. In competitive markets, entrepreneurs offering new and improved services can hope to reap above-market profits for some period, at least until competitors catch up, but also take the risk that the services will not succeed in the marketplace. Permitting cable operators to take the risks and to keep the rewards of introducing new and improved services, at least for a reasonable period, should have similar benefits when applied to cable operators.

301. In addition, we expect that the additional services will be indirectly regulated by the price cap on current regulated services. The added services and capabilities must effectively compete with the other regulated services, whose rates are limited by regulation. Customers are likely to subscribe to and pay for the added services and capabilities only if they offer additional value at a reasonable price, in comparison to those offered by current tiers.

302. To generate an incentive plan that is effective in

encouraging operators to invest in worthwhile upgrades, but also fair to customers, we would expect that the rate limits on existing services and the rate flexibility for new services would apply for a substantial period, but would be subject to eventual review. In the case of telephone companies, we set an initial review during the fourth year of the price cap incentive plan. In view of the initial start-up issues for any incentive plan for cable operators, a longer period is probably desirable, both to permit operators to understand and respond to the plan and to assure strong efficiency incentives. We thus propose to review the plan in the fifth year of operation.

303. We believe the need to introduce a plan to encourage cable upgrades and otherwise carry out the policies of the Cable Act of 1992, coupled with the experience we have already acquired in implementing incentive regulation for telephone companies and the record developed in this proceeding warrant adopting the Upgrade Incentive Plan on an experimental basis. Cable systems that commit to meet the basic obligations of freezing rates for current services that have been adjusted to benchmark/price cap or cost of service levels, or conforming their rates to the price cap, and maintaining programming and service quality that is at least as valued by customers as that offered currently, will be permitted substantial rate flexibility in the rates they might wish to introduce for additional regulated services and capabilities for a term of years, up to five years, from the acceptance of the plan. These experimental plans will then be monitored and reviewed no later than the fifth year to evaluate their performance.

304. To gain experience with this approach, we will consider proposals from cable operators that will implement the Upgrade Incentive Plan on an experimental case-by-case basis, for a limited term of years. Cable operators wishing to participate should submit a proposal to the Commission's Cable Services Bureau outlining a proposal and explaining how it would implement the objectives we have outlined here. The proposal should also be accompanied by a written statement by any certified franchising authority with jurisdiction over cable systems affected by the plan of its views concerning the proposed agreement.

XII. Cost-Based Cable Rate Regulation

A. Cost-of-Service Requirements

305. In the Report and Order, we establish a comprehensive interim regulatory framework for setting cost-based rates for regulated cable service. We tentatively conclude that the rules adopted here reflect goals and policies that will continue to apply, and that those rules may therefore appropriately be adopted on a final basis. We request comment on whether we should adopt these requirements as our final cost rules in this proceeding. In the Report and Order, for example, we establish an interim overall rate of return of 11.25% for use in cable cost-of-service proceedings. We invite comment on whether we should establish a different permanent rate of return for regulated cable service, including the equipment basket. In this regard, we request interested persons to submit data and expert analyses regarding the risks of regulated cable service, and on how those risks are affected by our cost-of service and our benchmark/price cap rules for cable. We also invite commenters to submit data and expert analyses regarding equity and debt costs for regulated cable service, and the capital structure we should use in determining any permanent rate of return for that service. We also invite comment on whether we should adopt fixed cost of debt and capital structure methodologies for possible use in changing the rate of return for cable in the future and, if so, what those methodologies should be.

B. Cable Accounting System

306. As explained in the Report and Order, we have decided to establish a uniform accounting system for cable operators electing cost-of-service regulation. Attachment C sets forth a draft system that we intend to serve as a starting point for development of a uniform accounting system for cable operations.[563] We seek comment on this proposal. The Cable Services Bureau will obtain suggestions on how to improve this proposal through informal meetings with representatives from the

---

[563] In order to facilitate administration of establisment of a uniform accounting system for cable services, we are removing this issue from MM Docket 92-666 and designating it as CS Docket No. 94-28.

cable industry and other interested parties.[564] Following these meetings and the completion of the initial comment cycle, we may seek comment on a revised proposal for a uniform system of accounts for provision of regulated cable service.

307. The system of accounts that we are proposing is adapted from the USOA for Class B telephone companies contained in Part 32 of the Commission's rules,[565] and from NARUC model cable accounting rules.[566] This proposed system of accounts is highly aggregated and is, therefore, far less burdensome than the USOA for Class A telephone companies.[567] We have relied on Part 32 in developing an accounting system for cable because it was designed as a functional accounting system that would be adaptable to changes in communications technology.[568] We tentatively conclude that we can accommodate the cable technology of signal transport by adding certain cable-specific accounts and by modifying account definitions to include cable-specific equipment and activities within existing functions.[569]

---

[564] Such cooperative efforts will, of course, be subject to relevant ex parte rules. See 47 C.F.R. §1.1206.

[565] Part 32 of the Commission's rules provide that telephone companies with annual revenues of less than $100,000,000 may adopt Class B level accounts. The Class B accounting system is highly aggregated and requires fewer accounts than does the Class A level. See 47 C.F.R. §32.11.

[566] Uniform System of Accounts for Class A Community Antenna (CATV) Utilities, (National Association of Regulatory Utility Commissioners 1977).

[567] Class A companies have annual revenues from regulated telecommunications operations of $100,000,000 or more. We seek comment, however, on whether we should adopt an accounting system for cable that is disaggregated to a greater extent than that proposed in Attachment C.

[568] See 47 C.F.R. §32.2(d), (e).

[569] We note that in the relatively recent rewrite of Part 32, we substantially conformed the USOA for telephone companies with GAAP. See Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles, 50 Fed. Reg. 48408 (Nov. 25, 1985); Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 2 FCC Rcd 1086 (1987). We expect that most cable operators are already in conformance with GAAP, and we conclude that this should minimize

308. In the Report and Order, we adopt an abbreviated cost of service form for use by small systems.[570] We also seek comment on whether smaller cable systems that elect cost-of-service regulation should be required to maintain their books in accordance with the accounting system we adopt for cable or with some alternative system of accounts. In addition, we seek comment on accounting requirements for cable operators seeking rate adjustments due to changes in their external costs under the benchmark/price cap approach. Although we conclude in the Order that operators regulated under that approach should not be subject to the USOA we adopt for cable,[571] we believe accounting requirements may be necessary to ensure that external cost adjustments are correct. Finally, we propose an exemption from these requirements for companies that are currently required to maintain their accounts in accordance with Part 32 of our rules. We tentatively conclude that it would be unduly burdensome to require such companies to follow separate accounting procedures for their telephone and cable operations.

C. Affiliate Transactions

309. In the Report and Order, we adopt affiliate transaction requirements that will govern the costs incurred that can be recovered in rates for regulated cable service.[572] These

---

the number of changes in accounting practices that will be required in implementing a system of accounts based on the Part 32 model.

[570] See part IX.A., supra.

[571] See part VII., supra.

[572] See Part VIII. supra. We adopted affiliate transaction rules for cable operators electing cost of service regulation or seeking to adjust the Benchmark rate to reflect programming costs from affiliated programmers. These new affiliate transaction rules are similar to those that telephone companies are now required to follow. See 47 C.F.R. §32.27. These rules provide that when a cable operator sells assets to an affiliate or buys assets from an affiliate, the assets shall be valued at the asset provider's prevailing company price, if the provider has sold the same kind of asset to a substantial number of third parties at a generally available price. Absent a prevailing company price, the cable operator shall value the asset at the higher of net book cost and estimated fair market value when the regulated cable system is the seller, and at the lower of net book cost and estimated fair market value when the regulated cable system is the buyer.

requirements are substantially similar to our proposals in the Notice in this proceeding.[573] Subsequent to the release of that Notice, however, we conducted a detailed analysis of each of these transaction methods for telephone companies.[574] In the Telco Notice, we proposed to sharply curtail prevailing company pricing for transactions between telephone companies and their nonregulated affiliates.[575] We also proposed to require telephone companies to value affiliate transactions for which we do not permit prevailing company pricing at the higher of cost and estimated fair market value when the telephone company is the seller, and at the lower of cost and estimated fair market value when the telephone company is the buyer.[576]

310. We tentatively conclude that the general changes we have proposed for telephone companies should be applied to cable operators as well. Therefore, we propose to limit the application of the prevailing company price as a measure of a reasonable price for an affiliate transaction. We tentatively conclude that we should not permit prevailing company pricing as a valuation method for transactions between cable operators and their affiliates when a primary purpose of the non-cable affiliate in transactions is to serve the cable operator and its affiliates. We tentatively conclude that prevailing company pricing for affiliate transactions should only be utilized where the predominant purpose of the non-cable affiliate in the transaction is to serve nonaffiliates. We believe that we can identify when the non-cable affiliates's predominant purpose is to serve nonaffiliates by measuring the percentage of each non-cable affiliate's total output that is sold to nonaffiliates.

In addition, when a cable operator sells services to an affiliate or buys services from an affiliate, the services shall be valued at the provider's prevailing company price, if the provider has sold the same kind of service to a substantial number of third parties at a generally available price. When the provider has established no prevailing company price, the cable operator must value the service at the service provider's cost.

[573] Notice at ¶¶ 67-69.

[574] See Amendment of Pars 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates, Notice of Proposed Rulemaking, 8 FCC Rcd 8071 (1993) (Telco Notice).

[575] Id. at 8100.

[576] Id. at 8080.

311. Accordingly, we propose that any non-cable affiliate that sells less than 75 percent of its output to non-affiliates has too large a volume of affiliate transactions to be deemed to have a predominant purpose of serving non-affiliates. Therefore, we propose to continue to allow prevailing company pricing only for affiliate transactions in which the non-cable affiliate sells at least 75 percent of its output to non-affiliates. We invite the commenters to discuss this proposal as well as alternative percentages we might use. We also invite comment on whether we should abandon prevailing company pricing as a valuation method for all affiliate transactions if we find no workable test for determining when prevailing company prices provide reliable measures of how affiliate transactions should be valued.

312. For those transactions that do not meet the prevailing company price test, we propose to require cable operators to value all affiliate transactions at the higher of cost and estimated fair market value when the cable operator is the seller, and at the lower of cost and estimated fair market value when the cable operator is the purchaser. Since this proposal applies to the sale of both assets and services, it would, in effect, retain the existing standard that applies to affiliate transactions that involve the sale of assets and it would expand the application of this rule to affiliate transactions that involve the sale of services. Hence, our proposal would change the requirement under the rules we have adopted with this Report and Order, which provides that affiliate transactions that do not meet the prevailing company price test and involve the sale of services shall be recorded at cost. We invite comment on this proposal.

313. We propose to retain the definition of affiliate that we adopt in the Report and Order.[577] We also propose that our final affiliate transactions rules for cable, like the interim rules, apply to cable operators who either elect cost-of-service regulation or seek to adjust benchmark/price cap rates for affiliated programming costs. We propose, in addition, to require cable operators to apply the costing methods and rate of return we adopt for cable in determining the costs of affiliate transactions. We propose to include our final affiliate

---

[577] Under that definition, an entity is affiliated with a cable system operator when it has a five percent or greater ownership interest in the cable system operator. That definition also specifies that a cable system operator is affiliated with another entity when it has a five percent or greater interest in that entity and that two companies that do not own each other are affiliates when a single entity has a five percent or greater interest in each of the two companies. See part VII, supra.

transactions rules in the USOA we adopt for cable. We invite comment on these proposals. Consistent with our approach with regard to the USOA, we also invite comment on whether we should adopt alternative affiliate transactions rules for small cable companies.

D. Productivity Offset

314. In the Rate Order, we incorporated an annual inflation adjustment into our price cap mechanism governing rates for cable television service. Specifically, we adopted the Gross National Product Price Index (GNP-PI)[578] as the annual adjustment index for the cap for basic service tier rates.[579] As a result, regulated cable operators are permitted to adjust the capped based per channel rate for the basic service tier annually by the GNP-PI. In addition, there are certain categories of costs that cable operators are permitted to "pass through" to subscribers without a cost-of-service showing, even if the resulting rates exceed the applicable price cap.[580]

315. In the Rate Order, we declined to adopt a productivity offset to the GNP-PI for the non-programming costs incurred by cable companies given the paucity of information in the record that would provide a basis for determining productivity in the cable industry. We made it clear, however, that we would seek such information in the Notice.[581]

316. In the Notice, we solicited comment on whether there is a valid economic basis for assuming that cable television service has been, and will be, experiencing efficiency gains. We observed that there had been insufficient information in the

---

[578] The GNP-PI measures inflation in the gross national product and is produced by the Bureau of Economic Analysis (BEA). Rate Order at 5782, n.578.

[579] Id. at ¶¶ 233-35.

[580] These costs include: (1) retransmission consent fees; (2) programming costs; and (3) taxes, franchise fees, and the costs of other franchise requirements. We imposed an express limitation, however, on the pass-through costs for programming services affiliated with cable MSOs. Pass-through of increases in programming costs attributable to program services affiliated with such systems are capped at the lesser of the annual incremental increase in such costs or the GNP-PI. Rate Order at 5788.

[581] Rate Order at 5781-5782.

record to adopt a productivity offset in the price cap mechanism for cable operators.[582] In considering a regulatory framework to govern cost-of-service ratemaking for cable service, we invited the submission of industry studies or other expert economic analysis to examine four possible options: (1) no productivity offset; (2) a consumer productivity dividend of 0.5 percentage points; (3) a "telecommunications" industry adjustment of between 3.0 (for AT&T) and 3.3 (for the local exchange carriers) percentage points; and (4) a different productivity offset for cable operators.

317. The comments received in response to the Notice provided three general perspectives on the use of a productivity offset in cost-of-service ratemaking. The first perspective, which incorporates the views of cable operators and programmers,[583] generally supports the first option -- that is, no productivity offset under the cost-of-service rules. The second perspective, articulated by New Jersey, supports the use of a productivity offset of 2% as reflecting the known benefits of technology improvement in the cable industry[584]. The third perspective, which includes CFA, municipal franchising authorities,[585] local exchange carriers,[586] and ETS, generally supports the adoption of a 3.3% productivity offset, the standard imposed on the local exchange carriers, to be the standard for the cable television companies that choose cost-of-service ratemaking.

318. In this Further Notice, we affirm our tentative decision to incorporate an annual inflation adjustment into our price cap mechanism governing rates for cable television service. We believe that the use of the GNP-PI index in the benchmark will help achieve the statutory goal of reducing administrative burdens on cable systems, consumers and regulators by permitting

---

[582] Notice at ¶ 85.

[583] See, e.g., COA Comments at 91; Cablevision Industries Comments at 60-62; Cablevision Systems Comments at 41; Georgia Cable Comments at 40; Discovery Comments at 5-8; Medium Operators Commits at 12-14; TCI Comments at 67-70; Time Warner Comments at 41-47; Viacom Comments at 61-62.

[584] New Jersey Comments at 11.

[585] See, e.g., Austin Comments at 15-16; Municipals Comments at 30-31.

[586] See, e.g., Bell Atlantic Comments at 10-13; BellSouth Comments at 34-35.

rate increases when cable operators experience increases in the cost of doing business shared by all sectors of the economy, without requiring cable operators to make, and regulators to consider, cost-of-service showings.

319. We also tentatively conclude that cable operators should reasonably be expected to achieve productivity gains in the future analogous to those historically realized by other communications firms. Cable television networks are similar in many ways to telephone networks, and both have benefited from advances in telecommunications technology in the past; both are likely to see benefits in the future, especially as cable and telephone networks converge. Both are likely to have opportunities to improve their productivity in other aspects of their operations, including customer service and maintenance. In the near term, however, the productivity growth that cable operators may reasonably be expected to achieve may differ from that of telephone companies, because of the current differences in their networks, operations, services, and histories. For example, local telephone companies have benefited from advances in computerized local switches, which are not in general use by cable systems. Moreover, the productivity offsets selected for telephone companies reflect adjustments to conform them with Commission policy goals. While we recognize the merits of moving toward regulatory parity for cable and telephone regulation, we do not believe the current record provides adequate support for the automatic adoption of the same productivity factor for cable systems as for local telephone companies subject to price caps.

320. The only evidence of record for productivity growth by cable systems appears to be that submitted by New Jersey, supporting a 2 percent productivity offset. We take note, however, of comments from cable operators that there is not sufficient evidence to adopt a productivity offset, without providing them the opportunity to develop such data. We will accordingly allow them another opportunity to provide this data. Based on the current record, we tentatively propose to adopt a 2 percent productivity offset as part of the benchmark for regulated cable rates. Any interested party seeking to justify a different productivity offset will of course be expected to provide reliable, detailed, and credible evidence that some other figure represents the productivity gains, after inflation, that cable systems can reasonably be expected to achieve. In particular, cable systems should not expect that their failure to provide any evidence of cable system productivity gains, information they are best able to provide, should justify the conclusion that cable systems cannot reasonably be expected to achieve productivity improvements.

321. We envision this benchmark, including the inflation

adjustment and productivity offset, as a basic part of the two alternatives open to cable operators for setting rates. Under the first, the benchmark would apply to all regulated rates. Under the second, an operator can elect to use cost-of-service regulation, under the standards discussed in this Order. Once the operator's rates are set based upon actual costs of service, however, we would ordinarily expect that the operator could achieve the same future productivity gains as other operators. We therefore propose that future rate changes should at least meet the productivity offset, absent a credible demonstration in the cost-of-service showing that this will not be the case.

322. We do not, however, wish indirectly to restrict the ability of cable programmers to obtain fair value for their products.[587] As a result, we tentatively conclude that programming costs should not be included within the productivity offset for cable system technological and operational improvement.

323. We invite comment on these proposals, including the 2 percent productivity offset and exemption of programming costs from the effects of the offset. We emphasize that comments should be supported by relevant evidence, such as detailed industry studies and expert economic analysis.

E. Upgrade Incentive Plan

324. As we discussed above, the Upgrade Incentive Plan that we will implement on an experimental, case-by-case basis is intended to provide greater assurance of reasonable, stable rates to customers for existing services, while also generating profit incentives to operators to upgrade their systems in cost-effective ways that will benefit subscribers. The basic approach of the plan is to establish a type of social contract between customers and operators, under which the rates for current regulated services are frozen or limited to changes permitted by the benchmark/price cap mechanism, while the quality of service is at least maintained at current levels by some reasonable measure. For their part, operators are given substantial rate flexibility for the new services and capabilities they introduce. The operator thus gains the opportunity to earn higher profits as an incentive and reward for successful innovations. The contract would remain in effect for a fixed, minimum term of years.

325. Developing a permanent incentive plan for cable systems is also likely to raise other issues, including issues that might suggest different regulations than in the case of the

---

[587] See, e.g., MPAA Comments at 2-3.

incentive programs we have adopted for telephony. One issue involves enrollment. We might, for example, require cable systems to seek enrollment in the incentive plan in advance of any system upgrade if it wishes to claim the rate and profit flexibility accorded to additional regulated services and capabilities. Enrollment would make clear to this Commission and to customers that the operator was committing itself to keeping existing service rates and quality within the bounds set by the plan. We request comment on these issues.

326. Another issue involves coordination with the regulation of basic service tier rates exercised by local franchising authorities. Setting price and quality limits on regulated services above the basic tier may encourage operators to attempt to shift costs to the basic tier. It may be difficult to identify such cost-shifting in a cost-of-service study review. One remedy for this problem, which may also reduce regulatory burdens for operators, franchising authorities, and this Commission, may be to require the operator to commit to maintaining its basic service tier rates and quality within baseline/price cap guidelines set by a certified franchise authority. We request comment on this or approaches to coordinating FCC and local regulation of cable rates within the Plan.

327. An important part of any incentive plan that limits prices is to assure that the value of the service provided to customers under those prices does not suffer. The customer should be assured that the regulated company is not evading the intent of the plan by increasing profits not through improved efficiency or added services, but by adulterating the products or services the customer receives. For cable service, assuring that appropriate standards are maintained includes assuring that programming services valued by customers are not shifted out of current tiers and into the additional tiers for which the operator would seek to claim rate flexibility. We seek comment on appropriate standards to assure that operators subject to the incentive plan provide services equal to or better than that offered under current rates applicable to those services.

328. One possible approach to maintaining the value of current services while permitting flexibility to adjust tiers might be to require operators to seek the approval of its customers to changes in the composition or rates for current regulated services, in effect empowering customers to decide whether the change is worthwhile. If most of the operator's customers affirmatively agreed by ballot to revise regulated services subject to the incentive plan, this Commission could be confident that the change was reasonable. In any case, of course, operators would be free to offer new services, and we

expect this Plan will encourage them to do so. The only issue would be whether the operator had fulfilled its commitment to maintain or improve the quality of the service provided at regulated rates. We request comment on this and other approaches that would permit reasonable revisions to the current services and rates subject to the incentive plan, especially approaches that take into account the views of the customers using those services.

329. We request comment on whether we should adopt rules for our Upgrade Incentive Plan. We request that commenters address how the plan, if adopted permanently, might best be structured to maximize the benefits to consumers and operators and to encourage efficient operation and innovative services, and what procedures should govern implementation of the Upgrade Incentive Plan by operators. We solicit comment on what standard we should adopt to measure quality of service for existing services; we seek comment also on the extent to which we should permit operators to move existing channels to new regulated tiers eligible for pricing flexibility under an upgrade incentive plan.

F. Average Cost Schedules

330. The Cable Act of 1992 instructs us to consider administrative burdens in establishing rate regulation, and to design rate regulation in a manner that reduces "the administrative burdens and cost of compliance of cable systems that have 1,000 or fewer subscribers."[588] We have met this mandate by providing in the Benchmark Order for streamlined rate reductions for small systems;[589] by providing in the Report and Order here for abbreviated Cost of Service filings by small systems;[590] and by other measures adopted in this Rate Order.[591]

331. We sought comment in the Notice regarding the desirability of allowing cable operators to justify rates based on average costs of providing regulated cable service, in an approach similar to the 'average schedule' regulatory scheme for provision of interstate access by some telephone companies.[592] We

---

[588] 47 U.S.C. §543(i).

[589] Benchmark Order at Part II.D.1.c.

[590] See part IX.A., supra.

[591] Rate Order at 5917-5924.

[592] Notice at ¶ 74.

believe that average cost schedules could provide administrative relief for cable operators and regulators by permitting setting of rates for regulated equipment and cable service by reference to average costs rather than an evaluation of each individual operator's costs. Accordingly, we tentatively conclude that we should establish average cost schedules for provision of regulated cable service and equipment.

332. We will obtain necessary cost information through our industry cost studies.[593] In addition, operators and other interested parties may submit other cost information that they believe will be useful. The Cable Service Bureau will additionally work informally with interested organizations to facilitate the compilation, analysis and development of average cost schedules.

333. We solicit comment on whether average cost schedules should be available for all operators, or only small systems.[594] If use of average cost schedules should be limited to small entities, we solicit comment on how we should define small systems for this purpose. Commenters suggesting the restriction of average schedules to small entities, or suggesting a particular threshold or definition for 'small,' should support their recommendations with data, including differences in costs, efficiencies, corporate structures or other factors, that would necessitate the proposed differences in treatment.

XIII. Initiation of Cost Studies

334. In the Notice we stated that we would conduct cost studies of the cable industry to provide information that could be useful to develop requirements to set rates based on costs.[595] We have additionally tentatively concluded in this proceeding to develop average cost schedules for provision of regulated cable service and equipment. In the Benchmark Order, we have determined that we will collect information on costs with respect to small operators and systems with relatively low prices. Actually, we are initiating at this time general cost studies of the cable industry that will be used for these purposes as well

---

[593] Part XIII., infra.

[594] We note that the average schedules developed for use by telephone companies in calculating access charges are not restricted to small telephone companies, although that has been their principal use. See 47 C.F.R. §69.606.

[595] Notice at ¶ 80.

as to provide information that will help us determine whether any changes should be made in our interim framework for cost-of-service regulation. We delegate to the Chief, Cable Services Bureau authority to conduct these studies. Since the cost studies will be part of this rulemaking proceeding, the ex parte rules for non-restricted proceedings apply. Requests for confidentiality may be made pursuant to Section 0.459 of the Commission's rules.

XIV. Regulatory Flexibility Analysis

A. Final Regulatory Flexibility Analysis for the Report and Order

335. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Sections 601-12, the Commission's final analysis with respect to the Report and Order is as follows:

336. Need and purpose of this action: The Commission, in compliance with Sections 3 and 14 and those portions of Section 9 of the Cable Television Protection and Competition Act of 1992 (the Act) pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burdens on cable entities.

337. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA): The Chief Counsel for Advocacy of the United States Small Business Administration ("Office of Advocacy") offers several remarks in response to the IRFA. The Office Advocacy expresses concern that numerous small cable operators cannot operate profitably, if at all, under the constraints imposed by the benchmark. It agrees with the Commission that some other process must be developed to permit small cable operators to demonstrate the reasonableness of rates. The Office of Advocacy believes the Commission's experience with regulation of common carriers may prove beneficial in developing mechanisms that balance the need for exactitude with administrative simplicity.

338. First, the Office of Advocacy opines that the 1,000 subscriber standard in the 1992 Act does not provide an adequate definition of small operator. It recommends defining small cable operators as those with less than $7.5 million in gross revenues, a standard roughly equivalent to 20-25,000 subscribers. Within this category it recommends separate tiers at 1,000, 3,500, and 10,000 subscribers.

339. Second, the Office of Advocacy commends the Commission for its compliance with the Regulatory Flexibility Act and its

extensive examination of alternative regulatory regimes. It supports the Commission's proposal to streamline cost of service showings for smaller firms, if a relatively simple form can be developed to show what these costs are. It also supports the Commission's proposal of an abbreviated cost showing for significant capital expenditures. The Office of Advocacy also suggests that the Commission consider use of average cost schedules, maintained by an organization of cable operators to provide the same functions for the cable industry that the National Exchange Carrier Association performs for local telephone companies.It opposes use of 1986 rates adjusted for inflation and productivity as an alternative.

340. Third, the Office of Advocacy also supports considering exemptions for small cable operators, provided certain principles are maintained, including a Commission finding that exempt operators' rates are reasonable.

341. Most of the proposals raised by the Office of Advocacy were adopted by the Commission in some form, or are the subject of further comment. For example, the definition of a small cable operator for purposes of cost of service showings was broadened to 15,000 subscribers. We expect that this definition will fairly balance the costs of regulation with the need to ensure reasonable rates.

342. The Commission also is adopting its proposals for streamlined cost of service studies for small companies, based on a simplified form, and abbreviated cost of service showings for significant capital expenditures. We are also seeking the information needed to consider development of average cost schedules. The Upgrade Incentive Plan we are adopting on an experimental basis, and seeking comment on, may also be an attractive alternative form of regulation, with substantially reduced administrative burdens, for small operators.

343. The Commission agrees with the Office of Advocacy that we must ensure that rates for regulated services are reasonable for all cable operators. We are also willing to consider proposals for pooling cable system costs and revenues in a manner similar to that employed for small telephone companies. It is unclear to us, however, that cable operators are sufficiently interested in such an approach to make its adoption worthwhile. Our consideration of average cost schedule approaches in the Further Notice may provide insight on this matter.

344. The Commission has also considered the other comments and proposals regarding small cable operators, as we discuss in more detail in the body of the Report and Order. For example, in response to a proposal in comments from Small Systems, we have

broadened the definition of small systems for purposes of the cost of service mechanisms to include MSOs with 250,000 or fewer subscribers, who do not own any system with more than 10,000 subscribers, and whose average system size is 1,000 subscribers or less.[596] Interested persons will also have the opportunity to submit further comments on these interim rules in the Further Notice so that we may consider appropriate revisions before these rules become final.

B. Initial Regulatory Flexibility Analysis for the Further Notice

345. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Further Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

346. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rate of cable systems subject to effective competition, as defined in the Cable Act of 1992, and interim regulations for setting rates for regulated services based on cost. This Further Notice proposes to establish additional and permanent regulations governing the setting of rates for regulated cable service based on costs.

347. Objectives. To propose rules to implement Section 623 of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

348. Legal Basis. Action as proposed for this rulemaking

---

[596] Small Systems Comments at 37.

is contained in Sections 4(i), 4(j), 612(c), and 623 of the Communications Act of 1934, as amended.

349. Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Further Notice. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 623(i) of the Cable Act of 1992.

350. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Further Notice include new and revised reporting and record keeping requirements for cable systems. These reporting requirements include the filings by cable operators of financial and/or leased access data annually at the Commission or participating in an annual survey. Additionally, this Further Notice proposes the permanent use of forms to submit data that is to be presented to the regulating entity in a cost-of-service showing by a cable operator. Furthermore, the Further Notice proposes general cost accounting and cost allocation requirements that could be imposed on the cable industry.

351. Federal rules which overlap, duplicate or conflict with this rule. None.

352. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. Wherever possible, the Further Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

XV. Paperwork Reduction Act

353. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

XVI. Procedural Provisions

354. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that ex parte contacts are permitted from the time of issuance of a

notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an ex parte presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this addresses the merits of the proceeding. Any person who submits a written ex parte presentation addressing matters not fully covered in any written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules. 47 C.F.R. §1.1231.

355. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **July 1, 1994** and reply comments on or before **August 1, 1994**. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

XVII. Ordering Clauses

356. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 532, 542(c) and 543, the rules, requirements, and policies discussed in the foregoing Report & Order ARE ADOPTED, and that Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Attachment B.

357. IT IS FURTHER ORDERED that, the rules, policies, and requirements adopted herein SHALL BE EFFECTIVE May 15, 1994.

358. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 612(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 532 (c), 542(c), and 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Further

Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

359. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

360. IT IS FURTHER ORDERED that AUTHORITY IS DELEGATED to the Chief, Cable Services Bureau to conduct cost studies in conjunction with this proceeding and to develop forms necessary and appropriate to implement this Order.

361. IT IS FURTHER ORDERED pursuant to Sections 4(i), 4(j), 623(b), and 623(c) of the Communications Act, 47 U.S.C §§ 154(i), 154(j), 543(b) and (c), that the Upgrade Incentive Plan described herein IS ADOPTED ON AN EXPERIMENTAL BASIS. Authority is delegated to the Chief, Cable Services Bureau to implement this plan.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment A

Comments

Aerie	Aerie Group Incorporated
Arlington	Arlington County, Virginia
Arthur Andersen	Arthur Andersen & Co.
Austin	Austin, Texas; King County, Washington; and Montgomery County, Maryland
Avenue TV	Avenue TV Cable Service, Inc.
Bell Atlantic	Bell Atlantic, The NYNEX Telephone Companies, and The Pacific Companies
BellSouth	BellSouth Telecommunications, Inc.
BC	Benchmark Communications
COA	Cable Operators and Associations
Cablevision Industries	Cablevision Industries Corporation, Consolidated Cable Partners, L.P., Crown Media, Inc., Multivision Cable TV Corp., Parcable, Inc., and Providence Journal Company
Cablevision Systems	Cablevision Systems Corporation
California Cable	The California Cable Television Association
CATA	Community Antenna Television Association, Inc.
CFA	Consumer Federation of America
Comcast	Comcast Cable Communications, Inc.
Connecticut	Connecticut Department of Public Utility Control
Continental	Continental Cablevision, Inc.
C-Span	National Cable Satellite Corporation (C-Span and C-Span 2)
Discovery	Discovery Communications, Inc.
Duncan	Duncan Cable TV
E!	E! Entertainment Television, Inc.
Eagle	Eagle Communications, Inc.
ETC	Economic and Technical Consultants, Inc.
Georgia Cable	Cable TV of Georgia Limited Partnership, Falcon Cable TV, Insight Communications, Mid-America CATV Association, Mount Vernon Cablevision, Inc., Nashoba Communications, Pennsylvania Cable Television Association, Prestige Cable TV, Westar Communications, and Whitcom Investment Company
GTE	GTE Service Corporation
MCATC	Massachusetts Community Antenna Television Commission
Media General	Media General Cable of Fairfax County, Inc.
Medium Operators	Medium-Sized Operators Group
Michigan Committee	Michigan Ad Hoc Committee for Fair Cable Rates
MPAA	Motion Picture Association of America, Inc.
Multichannel	Multichannel Communication Sciences, Inc.
Municipals	Counsel to the Municipal Franchising Authorities
Muzak	Muzak Limited Partnership
NATOA	National Association of Telecommunications Officers and Advisors, The National League of Cities, The United States Conference of Mayors, and The National Association of Counties

NCTA	National Cable Television Association
New Jersey	Staff of the New Jersey Board of Regulatory Commissioners
New York	New York State Commission on Cable Television
NTCA	National Telephone Cooperative Association

Comments (continued)

NY Assembly	New York State Assembly, Committee on Oversight, Analysis and Investigations
Omega	Omega Communications Inc.
Pegasus	Pegasus Cable Television
Philips	Philips Broadband Networks Inc.
SBA	United States Small Business Administration
SCBA	Small Cable Business Association
Seaford	City of Seaford, Delaware
Small Cities	Small Cities Cable Television
Small Systems	Prime Cable, Harron Communications Corp., Georgia Cable Partners, Atlanta Cable Partners, L.P., Wometco Cable Corp., and the Coalition of Small System Operators
Summit	Summit Communications, Inc.
TCI	Tele-Communications, Inc.
Time Warner	Time Warner Entertainment Company, L.P.
TMC	Tele-Media Corporation
Utah	Utah League of Cities and Towns
Viacom	Viacom International Inc.

Reply Comments

Aerie	
Arthur Andersen	
Austin	
Bell Atlantic	
Blade	Blade Communications, Inc.
COA	
Cablevision Industries	
Cablevision Systems	
Comcast	
Continental	
Corning	Corning Incorporated and Scientific-Atlanta, Inc.
Georgia Cable	
Grassroots	Grassroots Cable Systems
GTE	
Liberty	Liberty Media Corporation
Media General	
Medium Operators	
Municipals	
NATOA	
NCTA	
NTCA	
Pegasus	
SCBA	
Seaford	
Small Systems	
TCI	
Time Warner	
Viacom	

Ex Partes

Grand Rapids	City of Grand Rapids and other Michigan municipalities
ParCable I	ParCable, Inc., Star Cable Associates, Bend Cable Communications, Inc., Etan Industries, Inc., and River Valley Cable TV
Parcable II	ParCable, Inc.
COA	
Continental	
Comcast	Comcast Corporation
McConnell	Senator Mitch McConnell, Jr.[597]
Sun Country	Sun Country Cable

[597] Just passes on a letter from a constituent re small cable.

Attachment B
Rules

1. Section 76.922 is amended by adding paragraphs (g) through (k) to read as follows:

§ 76.922 Rates for the basic service tier and cable programming services tier

* * * * *

(g) Cost of Service Charge.

(1) For purposes of this section, a monthly cost-of-service charge for a basic service tier or a cable programming service tier is an amount equal to the annual revenue requirement for that tier divided by a number that is equal to 12 times the average number of subscribers to that tier during the test year, except that a monthly charge for a system or tier in service less than one year shall be equal to the projected annual revenue requirement for the first 12 months of operation or service divided by a number that is equal to 12 times the projected average number of subscribers during the first 12 months of operation or service. The calculation of the average number of subscribers shall include all subscribers, regardless of whether they receive service at full rates or at discounts.

(2) A test year for an initial regulated charge is the cable operator's fiscal year preceding the initial date of regulation. A test year for a change in the basic service charge that is after the initial date of regulation is the cable operator's fiscal year preceding the mailing or other delivery of written notice pursuant to Section 76.932 of the Commission's Rules. A test year for a change in a cable programming service charge after the initial date of regulation is the cable operator's fiscal year preceding the filing of a complaint regarding the increase.

(3) The annual revenue requirement for a tier is the sum of the return component and the expense component for that tier.

(4) The return component for a tier is the average allowable test year ratebase allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate multiplied by the rate of return specified by the Commission or franchising authority.

(5) The expense component for a tier is the sum of allowable test year expenses allocable to the tier adjusted for known and measurable changes occurring between the end of the test year and the effective date of the rate.

(6) The ratebase may include the following:

(i) Prudent investment by a cable operator in tangible plant that is used and useful in the provision of cable services less accumulated depreciation. Tangible plant in service shall be valued at the actual money cost (or the money value of any consideration other than money) of property at the time it was first used to provide cable service. The actual money cost of plant may include an allowance for funds used during construction at the prime rate or at the operator's actual cost of funds used during construction. Cost overruns are presumed to be imprudent investment in the absence of a showing that the overrun occurred through no fault of the operator.

(ii) An allowance for start-up losses, if any, that is equal to the lesser of the first two years of operating costs or accumulated losses incurred until the system reached the end of its prematurity stage as defined in Financial Accounting Standards Board Standard 51 ("FASB 51") less straight-line amortization over a reasonable period not exceeding 15 years that commences at the end of the prematurity phase of operation.

(iii) Intangible assets less amortization that reflect the original costs prudently incurred by a cable operator in organizing and incorporating a company that provides regulated cable services, obtaining a government franchise to provide regulated cable services, or obtaining patents that are used and useful in the provision of cable services.

(iv) The cost of customer lists if such costs were capitalized during the prematurity phase of operations less amortization.

(v) An amount for working capital to the extent that an allowance or disallowance for funds needed to sustain the ongoing operations of the regulated cable service is demonstrated.

(vi) Other intangible assets to the extent the cable operator demonstrates that the asset reflects costs incurred in an activity or transaction that produced concrete benefits or savings for subscribers to regulated cable services that would not have been realized otherwise and the cable operator demonstrates that a return on such an asset does not exceed the value of such a subscriber benefit.

(vii) The portion of the capacity of plant not currently in service that will be placed in service within twelve months of the end of the test year.

(7) Deferred income taxes shall be deducted from items included in the ratebase.

(8) Allowable expenses may include the following:

(i) All regular expenses normally incurred by a cable operator in the provision of regulated cable service, but not including any lobbying expense, charitable contributions, penalties and fines paid on account of violations of statutes or rules, or membership fees in social, service, recreational or athletic clubs or organizations.

(ii) Reasonable depreciation expense attributable to tangible assets allowable in the ratebase.

(iii) Reasonable amortization expense for prematurely abandoned tangible assets formerly includable in the ratebase that are amortized over the remainder of the original expected life of the asset.

(iv) Reasonable amortization expense for start-up losses and capitalized intangible assets that are includable in ratebase.

(v) Taxes other than income taxes attributable to the provision of regulated cable services.

(vi) An income tax allowance.

(h) Network upgrade rate increase.

(1) Cable operators that undertake significant network upgrades requiring added capital investment may justify an increase in rates for regulated services by demonstrating that the capital investment will benefit subscribers.

(2) A rate increase on account of upgrades shall not be assessed on customers until the upgrade is complete and providing benefits to customers of regulated services.

(3) Cable operators seeking an upgrade rate increase have the burden of demonstrating the amount of the net increase in costs, taking into account current depreciation expense, likely changes in maintenance and other costs, changes in regulated revenues and expected economies of scale.

(4) Cable operators seeking a rate increase for network upgrades shall allocate net cost increases in conformance with the cost allocation rules as set forth in § 76.924 of this subpart.

(5) Cable operators that undertake significant upgrades shall be permitted to increase rates by adding the benchmark/price cap rate to the rate increment necessary to recover the net increase

in cost attributable to the upgrade.

(i) Hardship rate relief.

A cable operator may adjust charges by an amount specified by the Commission for the cable programming service tier or the franchising authority for the basic service tier if it is determined that:

(1) Total revenues from cable operations, measured at the highest level of the cable operator's cable service organization, will not be sufficient to enable the operator to attract capital or maintain credit necessary to enable the operator to continue to provide cable service;

(2) The cable operator has prudent and efficient management; and

(3) Adjusted charges on account of hardship will not result in total charges for regulated cable services that are excessive in comparison to charges of similarly situated systems.

(j) Cost of service showing.

A cable operator that elects to establish a charge, or to justify an existing or changed charge for regulated cable service, based on a cost-of-service showing must submit data to the Commission or the franchising authority in accordance with forms established by the Commission. The cable operator must also submit any additional information requested by franchising authorities or the Commission to resolve questions in cost-of-service proceedings.

(k) Subsequent Cost of Service Charges.

No cable operator may use a cost-of-service showing to justify an increase in any charge established on a cost-of-service basis for a period of 2 years after that rate takes effect, except that the Commission or the franchising authority may waive this prohibition upon a showing of unusual circumstances that would create undue hardship for a cable operator.

2. Section 76.924 is amended by revising paragraphs (b), (c), (d), (e), and (f) as follows:

§ 76.924 Accounting and cost allocation requirements.

(b) Accounting requirements. Cable operators electing cost-of-service regulation or seeking rate adjustments due to changes

in external costs shall maintain their accounts:

(1) in accordance with generally accepted accounting principles; and

(2) in a manner that will enable identification of appropriate investments, revenues, and expenses.

(c) Accounts level. Except to the extent indicated below, cable operators electing cost of service regulation or seeking adjustments due to changes in external costs shall identify investments, expenses and revenues at the franchise, system, regional, and/or company level(s) in a manner consistent with the accounting practices of the operator on April 3, 1993. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes and local programming.

(d) Summary accounts.

(1) Cable operators filing for cost-of-service regulation, other than small operators, as defined by Section 76.922(b)(5)(A) of this subpart, shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the summary accounts listed below.

RATEBASE

Net Working Capital
Headend
Trunk and Distribution Facilities
Drops
Customer Premises Equipment
Construction/Maintenance Facilities and Equipment
Programming Production Facilities and Equipment
Business Offices Facilities and Equipment
Other Tangible Assets
Accumulated Depreciation
Plant Under Construction
Organizational and Franchise Costs
Subscriber Lists
Capitalized Start-up Losses
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Employee Payroll
Cable Plant Power Expense

Pole Rental, Duct, Other Rental for Cable Plant
Cable Plant Depreciation Expense
Cable Plant Expenses - Other
Plant Support Employee Payroll Expense
Plant Support Depreciation Expense
Plant Support Expense - Other
Programming Activities Employee Payroll
Programming Acquisition Expense
Programming Activities Depreciation Expense
Programming Expense - Other
Customer Services Expense
Advertising Activities Expense
Management Fees
General and Administrative Expenses
Selling General and Administrative Depreciation Expenses
Selling General and Administrative Expenses - Other
Amortization Expense - Franchise and Organizational Costs
Amortization Expense - Customer Lists
Amortization Expense - Capitalized Start-up Loss
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Operating Taxes
Other Expenses (Excluding Franchise Fees)
Franchise Fees
Interest on Funded Debt
Interest on Capital Leases
Other Interest Expenses

REVENUE AND INCOME ADJUSTMENTS
Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

(2) Small operators, as defined by Section 922(b)(5)(A) of this subpart, that file for cost of service regulation shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the following summary accounts:

RATEBASE
Net Working Capital
Headend, Trunk and Distribution System and Support Facilities and Equipment
Drops
Customer Premises Equipment
Production and Office Facilities, Furniture and Equipment
Other Tangible Assets
Accumulated Depreciation

Plant Under Construction
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Maintenance, Support and Operations Expense
Programming Production and Acquisition Expense
Customer Services Expense
Advertising Activities Expense
Management Fees
Selling, General and Administrative Expenses
Depreciation Expense
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Other Operating Expense (Excluding Franchise Fees)
Franchise Fees
Interest Expense

REVENUE AND INCOME ADJUSTMENTS

Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

(3) Cable operators shall not be required to report their investments, expenses and revenues to the summary accounts listed in subsections (1) and (2) of this section for purposes of adjusting rates based on changes in their external costs.

(e) Allocation to service cost categories.

(1) For cable operators electing cost-of-service regulation, investments, expenses, and revenues contained in the summary accounts identified in subsection (d) of this section shall be allocated among the Equipment Basket, as specified in § 76.923 of this subpart, and the following service cost categories:

(i) Basic service cost category. The basic service category, shall include the cost of providing basic service as defined by § 76.901(a) of this subpart. The basic service cost category may only include allowable costs as defined by §§ 76.922(g) through 76.922(k) of this subpart.

(ii) Cable programming services cost category. The cable programming services category shall include the cost of providing cable programming services as defined by § 76.901(b) of this subpart. This service cost category shall contain subcategories

that represent each programming tier that is offered as a part of the operator's cable programming services. All costs that are allocated to the cable programming service cost category shall be further allocated among the programming tiers in this category. The cable programming service cost category may include only allowable costs as defined in § 76.922(g) through 76.922(k) of this subpart.

(iii) Nonregulated cable programming services cost category. The nonregulated cable programming service cost category shall include the cost of providing video programming that is not carried on either the basic service tier or a cable programming service tier. It includes video programming that is offered (1) on a pay-per-channel basis (2) on a pay-per-program basis or (3) as any combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service consists of commonly-identified video programming and is not bundled with any regulated tier of service.

(iv) Other cable activities service cost category. The other cable activities service cost category shall include the cost of providing all cable services that are not included in the basic service, cable programming services, or nonregulated cable programming services categories. Other cable activities include leased commercial access, billing and collection services, studio and nonregulated equipment engineering and rental services, sale of nonregulated equipment, and maintenance of nonregulated equipment sold to customers.

(v) Non-cable activities service cost category. The noncable service cost category shall include the cost of providing all activities of a cable operator that are not related to the provision of cable services.

(2) Cable operators seeking an adjustment due to changes in external costs identified in FCC Form 1210 shall allocate such costs among the equipment basket, as specified in § 76.923 of this subpart, and the following service cost categories:

(i) The basic service category as defined by subsection (1)(i) of this section;

(ii) The cable programming services category as defined by subsection (1)(ii) of this section;

(iii) The nonregulated cable programming services cost category as defined by subsection (1)(iii) of this section;

(iv) The other cable activities service cost category as

defined by subsection (1)(iv) of this section; and

(v) The non-cable activities service cost category as defined by subsection (1)(v) of this section.

(f) Cost allocation requirements.

(1) Allocations of investments, expenses and revenues among the service cost categories and the equipment basket shall be made at the organizational level in which such costs and revenues have been identified for accounting purposes pursuant to § 76.924(c) of this subpart.

(1) Costs of programming and retransmission consent fees shall be directly assigned or allocated only to the service cost category in which the programming or broadcast signal at issue is offered.

(2) Costs of franchise fees shall be allocated among the equipment basket and the service cost categories in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities.

(3) Costs of public, educational, and governmental access channels carried on the basic tier shall be directly assigned to the basic tier where possible.

(4) All other costs that are incurred exclusively to support the equipment basket or a specific service cost category shall be directly assigned to that service cost category or the equipment basket where possible.

(5) Costs that are not directly assigned shall be allocated to the service cost categories in accordance with the following allocation procedures:

(i) Wherever possible, common costs for which no allocator has been specified by the Commission are to be allocated among the service cost categories and the equipment basket based on direct analysis of the origin of the costs.

(ii) Where allocation based on direct analysis is not possible, common costs for which no allocator has been specified by the Commission shall, if possible, be allocated among the service cost categories and the equipment basket based on indirect, cost-causative linkage to other costs directly assigned or allocated to the service cost categories and the equipment basket.

(iii) Where neither direct nor indirect measures of cost

allocation can be found, common costs shall be allocated to each service cost category based on the ratio of all other costs directly assigned and attributed to a service cost category over total costs directly or indirectly assigned and directly or indirectly attributable.

3. Section 76.924 is amended to redesignate paragraph (g) as (j) and to add paragraph (g) to read as follows:

* * * * *

(g) Cost identification at the franchise level. After costs have been directly assigned to and allocated among the service cost categories and the equipment basket, cable operators that have aggregated costs at a higher level than the franchise level must identify all applicable costs at the franchise level in the following manner:

(1) Recoverable costs that have been identified at the highest organizational level at which costs have been identified shall be allocated to the next (lower) organizational level at which recoverable costs have been identified on the basis of the ratio of the total number of subscribers served at the lower level to the total number of subscribers served at the higher level.

(2) Cable operators shall repeat the procedure specified in subsection (1) of this section at every organizational level at which recoverable costs have been identified until such costs have been allocated to the franchise level.

* * * * *

5. Section 76.924 shall be amended by adding the following as paragraph (i):

* * * * *

(i) Transactions with affiliates. Adjustments on account of external costs and rates set on a cost-of-service basis shall exclude any amounts not calculated in accordance with the following:

(1) Charges for assets purchased by or transferred to the regulated activity of a cable operator from affiliates shall equal the invoice price if that price is determined by a prevailing company price. The invoice price is the prevailing company price if the affiliate has sold a substantial number of like assets to nonaffiliates. If a prevailing company price for the assets received by the regulated activity is not available, the charges for such assets shall be the lower of their cost to

the originating activity of the affiliated group less all applicable valuation reserves, or their fair market value.

(2) The proceeds from assets sold or transferred from the regulated activity of the cable operator to affiliates shall equal the prevailing company price if the cable operator has sold a substantial number of like assets to nonaffiliates. If a prevailing company price is not available, the proceeds from such sales shall be determined at the higher of cost less all applicable valuation reserves, or estimated fair market value of the asset.

(3) Charges for services provided to the regulated activity of a cable operator by an affiliate shall equal the invoice price if that price is determined by a prevailing company price. The invoice price is the prevailing company price if the affiliate has sold like services to a substantial number of nonaffililates. If a prevailing company price for the services received by the regulated activity is not available, the charges for such services shall be at cost.

(4) The proceeds from services sold or transferred from the regulated activity of the cable operator to affiliates shall equal the prevailing company price if the cable operator has sold like services to a substantial number of nonaffiliates. If a prevailing company price is not available, the proceeds from such sales shall be determined at cost.

(5) For purposes of Sections 76.924(i)(1) through 76.924(i)(4), cost shall be determined in accordance with the standards and procedures specified in Sections 76.922, 76.924(b), and 76.924(d) of this subpart.

Attachment C

Proposed Accounting Rules

1. Part 76 is proposed to be amended by adding Subpart P as follows:

UNIFORM SYSTEM OF ACCOUNTS FOR CABLE SYSTEM OPERATORS

Section

76.1100	Background
76.1101	Reporting Companies
76.1102	Records
76.1103	Accounts - General
76.1104	Regulated Accounts
76.1105	Interpretation of Accounts
76.1106	Waivers
76.1107	Address for Reports and Correspondence
76.1108	Number Convention
76.1109	Sequence of Accounts
76.1110	Nonregulated Activities
76.1111	Compensated Absences
76.1112	Materiality
76.1113	Nonregulated Investments
	CURRENT ASSETS
76.1114	Cash and Equivalents
76.1115	Accounts Receivable - Cable Services
76.1116	Accounts Receivable Allowance - Cable Services
76.1117	Other Accounts Receivable
76.1118	Accounts Receivable Allowance - Other
76.1119	Notes Receivable
76.1120	Notes Receivable Allowance
76.1121	Interest and Dividends Receivable
76.1122	Inventories
76.1123	Prepayments
76.1124	Other Current Assets
	NONCURRENT ASSETS
76.1125	Investments in Affiliated Companies
76.1126	Investments in Nonaffiliated Companies
76.1127	Nonregulated Investments
76.1128	Unamortized Debt Issuance Expense
76.1129	Sinking Funds
76.1130	Other Noncurrent Assets
76.1131	Deferred Maintenance and Retirements
76.1132	Deferred Charges

REGULATED PLANT

76.1133	Instructions for Cable Services Plant Accounts
76.1134	Cable Service Plant in Service
76.1135	Property Held for Future Use
76.1136	Cable Service Plant Adjustment
76.1137	Nonoperating Plant
76.1138	Goodwill
76.1139	Land
76.1140	Buildings
76.1141	Head End Equipment
76.1142	Distribution System
76.1143	Drops
76.1144	Production Equipment
76.1145	Customer Premises Equipment
76.1146	Maintenance and Warehouse Equipment
76.1147	Furniture
76.1148	Office Equipment
76.1149	Capital Leases
76.1150	Leasehold Improvements
76.1151	Intangibles
76.1152	Accumulated Depreciation
76.1153	Accumulated Depreciation Held for Future Use
76.1154	Accumulated Depreciation - Nonoperating
76.1155	Accumulated Amortization - Capitalized Leases
76.1156	Accumulated Amortization - Leasehold Improvements
76.1157	Accumulated Amortization - Intangible
76.1158	Accumulated Amortization - Other

CURRENT LIABILITIES

76.1159	Accounts Payable
76.1160	Notes Payable
76.1161	Advance Billing and Payments
76.1162	Customers' Deposits
76.1163	Current Maturities - Long Term Debt
76.1164	Current Maturities - Capital Leases
76.1165	Income Taxes - Accrued
76.1166	Other Taxes - Accrued
76.1167	Net Current Deferred Operating Income Taxes
76.1168	Net Current Deferred Nonoperating Income Taxes
76.1169	Other Accrued Liabilities
76.1170	Other Current Liabilities
76.1171	Funded Debt
76.1172	Premium on Long - Term Debt
76.1173	Discount on Long - Term Debt

76.1174	Reacquired Debt
76.1175	Obligations Under Capital Leases
76.1176	Advances from Affiliated Companies
76.1177	Other Long - Term Debt
76.1178	Other Long - Term Liabilities
76.1179	Unamortized Operating Investment Tax Credits - Net
76.1180	Unamortized Nonoperating Investment Tax Credits - Net
76.1181	Net Noncurrent Deferred Operating Income Taxes
76.1182	Net Noncurrent Deferred Nonoperating Income Taxes
76.1183	Other Deferred Credits
76.1184	Capital Stock
76.1185	Additional Paid - In Capital
76.1186	Treasury Stock
76.1187	Other Capital
76.1188	Retained Earnings
	REVENUE ACCOUNTS
76.1189	Instructions for Revenue Accounts
76.1190	Basic Service Tier Revenues
76.1191	Cable Programming Services Revenues
76.1192	Equipment and Installation Revenues
76.1193	Nonregulated Cable Programming Services
76.1194	Other Cable Revenues
76.1195	Uncollectible Revenue - Cable Services
76.1196	Uncollectible Revenue - Other
	EXPENSE ACCOUNTS
76.1197	Instructions for Expense Accounts
76.1198	Property Held for Future Use Expense
76.1199	Land and Building Expense
76.1200	Headend Equipment Expense
76.1201	Distribution System Expense
76.1202	Drops Expense
76.1203	Production Equipment Expense
76.1204	Customer Premises Equipment Expense
76.1205	Maintenance and Warehouse Expense
76.1206	Furniture and Artworks Expense
76.1207	Office Equipment Expense
76.1208	Basic Cable Programming Expense
76.1209	Basic Cable Programming Expense
76.1210	Retransmission Consent Expense
76.1211	Public, Educational, Governmental Access Expense
76.1212	Local Origination Expense
76.1213	Other Basic Cable Programming Expense
76.1214	Cable Programming Service Expense

76.1215	Cable Programming Service Satellite Programming Expense
76.1216	Cable Programming Service Retransmission Consent Expense
76.1217	Cable Programming Service Local Origination
76.1218	Other Cable Programming Expense
76.1219	Accumulated Depreciation and Amortization Expense
76.1220	Accumulated Depreciation Expense - Cable Services Plant in Service
76.1221	Accumulated Depreciation Expense - Property Held for Future Cable Services Use
76.1222	Amortization Expense - Tangible
76.1223	Amortization Expense - Intangible
76.1224	Amortization Expense - Other
76.1225	Other Property, Plant and Equipment Expenses
76.1226	Cable System Operations Expenses
76.1227	Marketing
76.1228	Customer Services
76.1229	Executive and Planning
76.1230	General and Administrative
76.1231	Provision for Uncollectible Notes Receivables
76.1232	Instructions for Other Income Accounts
76.1233	Contents of Accounts
76.1234	Other Operating Income and Expenses
76.1235	Operating Taxes
76.1236	Nonoperating Income and Expense
76.1237	Nonoperating Taxes
76.1238	Interest and Related Items
76.1239	Extraordinary Items
76.1240	Nonregulated Net Income
76.1241	Glossary of Terms

Subpart P -- Uniform System of Accounts for Cable System Operators

§ 76.1100 Background

The Uniform System of Accounts (USOA) for cable systems is designed for those cable operators that elect cost of service regulation. The purpose of the USOA is to help ensure that in cost of service proceedings, regulators will have accurate records of cable operators' revenues, operating expenses, depreciation expenses and capital investments. In order for an accounting system to fulfill this purpose, it must exhibit consistency and stability in financial reporting. This USOA has, therefore, been designed to reflect stable, recurring, financial data, based to the extent regulatory considerations permit, upon the consistency of the well established body of accounting theories and principles commonly referred to as generally accepted accounting principles.

§ 76.1101 Reporting companies

(a) Cable operators, that elect cost of service regulation must have or develop accounting records in accordance with this Subpart for the relevant test year in the cost of service proceeding.

(b) If a cable operator does not develop or maintain its accounting records in accordance with this subpart for the relevant test year, the cable operator's cost of service application will be dismissed.

§ 76.1102 Records

(a) The reporting company's financial records shall be kept in accordance with generally accepted accounting principles to the extent permitted by this system of accounts.

(b) The reporting company's financial records shall be kept with sufficient particularity to show fully the facts pertaining to all entries in these accounts. The detail records shall be filed in such manner as to be readily accessible for examination by representatives of this Commission.

(c) The Commission shall require a company to maintain financial and other subsidiary records in such a manner that specific information, of a type not warranting disclosure as an account or subaccount, will be readily available. When this occurs, or where the full information is not otherwise recorded in the general books, the subsidiary records shall be maintained in sufficient detail to facilitate the reporting of the required specific information. The subsidiary records, in which the full details are shown, shall be sufficiently referenced to permit ready identification and examination by representatives of this Commission.

§ 76.1103 Accounts-General

(a) As a general rule, all accounts kept by reporting cable companies shall conform in numbers and titles to those prescribed herein. However, reporting companies may use different numbers for internal purposes when separate accounts (or subaccounts) maintained are consistent with the title and content of accounts and subaccounts prescribed in this system. A company may subdivide any of the accounts prescribed. The titles of all such subaccounts shall refer by number or title to the controlling account.

(b) A company may make any such subdivisions, reclassifications or consolidations of existing balances as are necessary to meet requirements of this system of accounts.

§ 76.1104 Regulated Accounts

(a) In the context of this subpart, regulated accounts shall be interpreted to include the investments, revenues and expenses associated with basic cable service, cable programming services, equipment and installation and other cable activities. For those cable operators that elect cost of

service regulation, these regulated products and services are fully subject to the accounting requirements in this subpart.

(b) In the application of detailed accounting requirements contained in this subpart, when a regulated activity involves the common or joint use of assets and resources in the provision of regulated and nonregulated products and services, companies shall account for these activities within the accounts prescribed in this system. Assets and expenses shall be subdivided in subsidiary records among amounts solely assignable to basic cable services, amounts solely assignable to cable programming services, amounts solely assignable to equipment and installation, amounts solely assignable to nonregulated cable programming services, amounts solely assignable to other cable activities, amounts solely assignable to noncable activities and amounts related to assets used and expenses incurred jointly or in common, which will be allocated among these service cost categories. Companies shall submit reports identifying regulated and nonregulated amounts in the manner and at the times prescribed by this Commission. Nonregulated revenue items not qualifying for incidental treatment shall be recorded in the Nonregulated Operating Revenue account.

(c) Other income items which are incidental to the provision of regulated products and services shall be accounted for as regulated activities.

§ 76.1105 Interpretation of accounts.

In order to maintain uniform accounting within the prescribed system, questions involving matters of significance which are not clearly provided for, shall be submitted to the Chief, Cable Services Bureau, for explanation, interpretation, or resolution. Questions and answers thereto with respect to this system of accounts will be maintained by the Cable Services Bureau.

§ 76.1106 Waivers.

A waiver from any provision of this system of accounts shall be made by the Federal Communications Commission upon its own initiative or upon the submission of written request therefor from any reporting company, provided that such waiver is in the public interest and each request for waiver expressly demonstrates that: existing peculiarities or unusual circumstances warrant a departure from a prescribed procedure or technique; a specifically defined alternative procedure will result in substantially equivalent or more accurate portrayal of operating results or financial condition, consistent with the principles embodied in the provisions of this system of accounts; and the application of such alternative procedure will maintain or improve uniformity in substantive results as among reporting companies.

§ 76.1107 Address for reports and correspondence.

Reports, statements, and correspondence submitted to the Federal Communications in accordance with or relating to instructions and requirements contained herein shall be addressed to the Cable Services Bureau, Federal Communications Commission, Washington, D.C. 20554.

§ 76.1108 Number convention.

(a) The number "76" (appearing to the left of the first decimal point) indicates the part number.

(b) The numbers immediately following to the right of the decimal point indicate, respectively, the section or account. All account numbers contain 4 digits to the right of the decimal point.

(c) Cross references to accounts are made by citing the account numbers to the right of the decimal point; e.g., Account 1114, rather than the corresponding complete reference number 76.1114.

§ 76.1109 Sequence of accounts.

The order in which the accounts are presented in this system of accounts is not to be considered as necessarily indicative of the order in which they will be scheduled at all times in reports to this Commission.

§ 76.1110 Nonregulated activities

(a) This section describes the accounting treatment of activities classified for accounting purposes as "nonregulated." Activities classified as "nonregulated cable programming services" and "noncable activities" will be classified for accounting purposes as "nonregulated." Activities that qualify for incidental treatment under the policies of this Commission will be classified for accounting purposes as regulated activities. The treatment of nonregulated activities shall differ depending on the extent of the common or joint use of assets and resources in the provision of both regulated and nonregulated products and services.

(b) When a nonregulated activity does not involve the joint or common use of assets and resources in the provision of both regulated and nonregulated products and services, reporting companies shall account for these activities on a separate set of books. In the separate set of books, reporting companies may establish whatever detail they deem appropriate beyond what is necessary to provide this Commission with the information required in this subpart.

(c) When a nonregulated activity does involve the common or joint use of assets and resources in the provision of regulated and nonregulated products and services, the reporting company shall account for these activities within accounts prescribed in this system. Assets and expenses shall be subdivided in subsidiary records among amounts solely assignable to nonregulated cable programming activities, amounts solely assignable to other cable activities, amounts solely assignable to noncable activities, amounts solely assignable to basic cable services, amounts solely assignable to cable programming services, amounts solely assignable to equipment and installation, and amounts related to assets used and expenses incurred jointly or in common, which will be allocated among these service cost categories. Companies shall submit reports identifying regulated and nonregulated amounts in the manner and at the times prescribed by this Commission. Nonregulated revenue items not qualifying for incidental treatment shall be recorded in the nonregulated operating revenue account.

§ 76.1111 Compensated absences.

Reporting companies shall record a liability and charge the appropriate expense accounts for compensated absences (vacations, sick leave, etc.) in the year in which these benefits are earned by employees.

§ 76.1112 Materiality

Reporting companies shall follow this system of accounts in recording all financial and statistical data irrespective of an individual item's materiality under GAAP, unless a waiver has been granted under the provisions of § 76.1106 of this subpart to do otherwise.

§ 76.1113 Nonregulated investments.

Nonregulated investments shall include the investments in nonregulated activities that are conducted through the same legal entity as the cable operator, but does not involve the joint or common use of assets or resources in the provision of both regulated and nonregulated products and services.

§ 76.1114 Cash and Equivalents.

(a) This account shall include the following:

(1) The amount of current funds available for use on demand in the hands of financial officers and agents, deposited in banks or other financial institutions and also funds in transit for which agents have received credit.

(2) The amount of cash on special deposit, other than in sinking and other special funds provided for elsewhere, to pay dividends, interest, and other debts, when such payments are due one year or less from the date of deposit; the amount of cash deposited to insure the performance of contracts to be performed within one year from date of the deposit; and other cash deposits of a special nature not provided for elsewhere. Cash on special deposit shall include the amount of cash deposited with trustees to be held until mortgaged property sold, destroyed, or otherwise disposed of is replaced, and also cash realized from the sale of the company's securities and deposited with trustees to be held until invested in physical property of the company or for disbursement when the purposes for which the securities were sold are accomplished. Cash on special deposit to be held for more than one year from the date of deposit shall be included in the Other Noncurrent Assets Account.

(3) The amount of cash advanced to officers, agents, employees, and others as petty cash or working funds from which expenditures are to be made and accounted for.

(4) The cost of securities acquired for the purpose of temporarily investing cash, such as time drafts receivable and time loans, bankers's acceptances, United States Treasury certificates, marketable securities, and other similar investments of a temporary character. Accumulated changes in the net unrealized losses of current marketable equity securities shall be included in the determination of net income in the period in which they occur in the Other Nonoperating Income Account.

§ 76.1115 Accounts receivable - cable services.

(a) This account shall include all amounts due from customers for services rendered or billed and from agents and collectors authorized to make collections from customers. This account shall also include all amounts due from customers or agents for products sold. This account shall be kept in such manner as will enable the company to make the following analysis:

(1) Amounts due from customers who are receiving cable service.

(2) Amounts due from customers who are not receiving service and whose accounts are in process of collections.

(b Collections in excess of amounts charged to this account may be credited to and carried in this account until applied against charges for services rendered or until refunded.

§ 76.1116 Accounts receivable allowance - cable services.

(a) This account shall be credited with amounts charged to the Uncollectible Revenue Account, to provide for uncollectible amounts included in the Accounts Receivable - Cable Services account. There shall be credited to this account amounts collected which previously had been written off through charges to this account and credits to the Accounts Receivable - Cable Services Account. There shall be charged to this account any amounts covered thereby which have been found to be impracticable of collection.

(b) If no such allowance is maintained, uncollectible amounts shall be charged directly to the Uncollectible Revenue account.

§ 76.1117 Other accounts receivable.

This account shall include all amounts currently due, and not provided for in other accounts, such as divisions of revenue, material and supplies,

matured rents, and interest receivable under monthly settlements on short term loans, advances, and open accounts.

§ 76.1118 Accounts receivable allowance - other.

(a) This account shall be credited with amounts charged to Uncollectible Revenue - Other account to provide for uncollectible amounts included in Other Accounts Receivable account. There shall also be credited to this account amounts collected which previously had been written off through charges to this account and credits to the Other Accounts Receivable account. There shall be charged to this account any amounts covered thereby which have been found to be impracticable of collection.

(b) If no such allowance is maintained, uncollectible amounts shall be charged directly to the Uncollectible Revenue - Other account.

§ 76.1119 Notes receivable.

This account shall include the cost of demand or time notes, bills and drafts receivable, or other similar evidences (except interest coupons) of money receivable on demand or within a time not exceeding one year from date of issue.

§ 76.1120 Notes receivable allowance.

(a) This account shall be credited with amounts charged to the Provision for Uncollectible Notes Receivable account to provide for uncollectible amounts included in the Notes Receivable account. There shall also be credited to this account amounts collected which previously had been written off through charges to this account and credits to the Notes Receivable account. There shall be charged to this account any amounts covered thereby which have been found to be impracticable of collection.

(b) If no such allowance is maintained, uncollectible amounts shall be charged directly to the Provision for Uncollectible Notes Receivable account.

§ 76.1121 Interest and dividends receivable.

(a) This account shall include the amount of interest accrued to the date of the balance sheet on bonds, notes and other commercial paper owned, on loans made, and the amounts of dividends receivable on stocks owned.

(b) This account shall not include dividends or other returns on securities issued or assumed by the company and held by or for it, whether pledged as collateral, or held in its treasury, in special deposits, or in sinking and other funds.

(c) Interest receivable under monthly settlements on short term loans, advances, and open accounts, shall be included in the Accounts Receivable - Cable Services account or the Accounts Receivable - Other account, as appropriate.

(d) Dividends received and receivable from affiliated companies accounted for on the equity method shall be included in the Investments in Affiliated Companies account, as a reduction of the carrying value of the investment.

§ 76.1122 Inventories

(a) This account shall include the cost of materials and supplies held in stock and inventories of goods held for resale or lease. The investment in inventories shall include materials and supplies and property held for sale or lease. This account shall not include items which are related to a nonregulated activity unless that activity involves joint or common use of assets and resources in the provision of regulated and nonregulated products and services.

(b) This account shall include cost of material and supplies held in stock, including plant supplies, motor vehicles supplies, tools, fuel, other supplies and material and articles of the company in process of manufacture for supply stock.

(c) This account shall include transportation charges and sales and use taxes, so far as practicable, as a part of the cost of the particular material to which they relate. Transportation and sales and use taxes which are not included as part of the cost of a particular material shall be equitably apportioned among the detail accounts to which material is charged.

(d) So far as practicable, cash and other discount on material shall be deducted in determining cost of the particular material to which they relate or credited to the account to which the material is charged. When such deduction is not practicable, discounts shall be equitably apportioned among the detail accounts to which material is charged.

(e) Material recovered in connection with construction, maintenance or retirement of property shall be charged to this account as follows:

(1) Reusable items that, when installed or in service, were retirement units, shall be included in this account at the original cost, estimated if not known.

(2) Reusable minor items that, when installed or in service, were not retirement units, shall be included in this account at current prices new.

(3) The cost of repairing reusable material shall be charged to the appropriate account in the Plant Specific Operations Expense accounts.

(4) Scrap and nonusable material included in this account shall be carried at the estimated amount which will be received therefor. The difference between the amounts realized for scrap and nonusable material sold and the amounts at which it is carried in this account, so far as practicable, shall be adjusted in the accounts credited when the material was taken up in this account.

§ 76.1123 Prepayments.

(a) This account shall include the following:

(1) The amounts of rents paid in advance of the period in which they are chargeable to income, except amounts chargeable to cable plant under construction and minor amounts which may be charged directly to the final accounts.

(2) The balance of all taxes, other than amounts chargeable to cable services plant under construction and minor amounts which may be charged to the final accounts, paid in advance and which are chargeable to income within one year.

(3) The amount of insurance premiums paid in advance of the period in which they are chargeable to income, except premiums chargeable to cable services plant under construction and minor amounts which may be charged directly to the final accounts.

(b) As the term expires for which any prepayment applies, this account shall be credited monthly and the appropriate account charged.

§ 76.1124 Other current assets.

This account shall include the amount of all current assets which are not includable in Accounts 1115 through 1123.

§ 76.1125 Investments in affiliated companies.

(a) This account shall include the acquisition cost of the company's investment in equity or other securities issued or assumed by affiliated companies, other than securities held in special funds which shall be charged to the Sinking Funds account. The carrying value of the investment (securities) accounted for on the equity method shall be adjusted to recognize the company's share of the earnings or losses and dividends received or receivable of the affiliated company from the date of acquisition.

(b) Declines in value of investments accounted for under the cost method shall be charged to the Other Capital account, if temporary and as a current period loss if permanent. Detail records shall be maintained to reflect unrealized losses for each investment.

(c) This account shall also include advances represented by book accounts only with respect to which it is agreed or intended that they shall be either settled by issuance of capital stock or debt; or shall not be subject to current cost settlement.

(d) A subsidiary record shall be kept identifying separately common stocks, preferred stocks, long-term debt, investment advances and special deposits of cash for more than one year from the date of deposit. Further, the company's record shall identify the securities pledged as collateral for any of the company's long-term debt or short-term loans or to secured performance of contracts.

(e) Amounts due from nonaffiliated companies which are subject to current settlement shall be included in the Accounts Receivable - Cable Services account or the Notes Receivable account, as appropriate.

(f) Subsidiary record categories shall be maintained in order that the entity may separately report the amounts contained herein that relate to the equity method and the cost method.

§ 76.1126 Investments in nonaffiliated companies.

(a) This account shall include the acquisition cost of the company's investment in securities issued or assumed by nonaffiliated companies and individuals, other than securities held in special funds which shall be charged to the Sinking Funds account, and also its investment advances to such parties and special deposits of cash for more than one year from date of deposit.

(b) Declines in value of investment shall be charged to the Other Capital account, if temporary and as a current period loss if permanent. Detail records shall be maintained to reflect unrealized losses for each investment.

(c) This account shall also include advances represented by book accounts only with respect to which it is agreed or intended that they shall be either settled by issuance of capital stock or debt; or shall not be subject to current cost settlement.

(d) A subsidiary record shall be kept identifying separately common stocks, preferred stocks, long-term debt, investment advances and special deposits of cash for more than one year from the date of deposit. Further, the company's record shall identify the securities pledged as collateral for any of the company's long-term debt or short-term debt or short-term loans or to secure performance of contracts.

(e) Amounts due from nonaffiliated companies which are subject to current settlement shall be included in the Accounts Receivable - Cable Services account, the Accounts Receivable - Other account, or the Notes Receivable account, as appropriate.

§ 76.1127 Nonregulated investments.

This account shall include the reporting company's investment in nonregulated activities accounted for in a separate set of books as provided in § 76.1110(b).

§ 76.1128 Unamortized debt issuance expense.

(a) This account shall include the total unamortized balance of debt issuance expense for all classes of outstanding long-term debt. Amounts included in this account shall be charged to Interest and Related Items account.

(b) Debt Issuance expense includes all expenses in connection with the issuance and sale of evidence of debt, such as fees for drafting mortgages and trust deeds; fees and taxes for issuing or recording evidences of debt; costs of engraving and printing bonds, certificates of indebtedness, and other commercial paper; fees paid trustees; specific costs of obtaining governmental authority; fees for legal services; fees and commissions paid underwriters, brokers, and salesmen; fees and expenses of listing on exchanges, and other like costs.

(c) A subsidiary record shall be kept of each issue outstanding.

§ 76.1129 Sinking funds.

(a) This account shall include the amount of cash and other assets which are held by trustees or by the company's treasurer in a distinct fund, for the purpose of redeeming outstanding obligations.

(b) Interest or other income arising from funds carried in this account shall generally be charged to this account.

(c) A subsidiary record shall be kept for each sinking fund which shall designate the obligation in support of which the fund was created.

§ 76.1130 Other noncurrent assets.

This account shall include the amount of all noncurrent assets which are not includable in Accounts 1125 through 1129.

§ 76.1131 Deferred maintenance and retirements.

This account shall include such items as the unprovided-for loss in service value of cable plant for extraordinary nonrecurring retirement not considered in depreciation and the cost of extensive replacements of plant normally chargeable to the current period Plant Specific Operations Expense accounts.

§ 76.1132 Deferred charges.

(a) This account shall include all deferred charges not provided for in the Deferred Maintenance and Retirements account. Such charges include unaudited amounts and other debit balances in suspense that cannot be cleared and disposed of until additional information is received; the amount, pending determination of loss, of funds on deposit with banks which have failed; revenue, expense, and income items held in suspense; amounts paid for options pending final disposition.

(b) This account shall include the cost of preliminary surveys, plans, investigation, etc., made for construction projects under contemplation. If the projects are carried out, the preliminary costs shall be included in the cost of the plant constructed. If the projects are abandoned, the preliminary costs shall be charged to the Nonoperating Income and Expense account.

(c) This account shall include also the cost of evaluations, inventories, and appraisals taken in connection with the acquisition or sale

of property. If the property is subsequently acquired, the preliminary costs shall be accounted for as a part of the cost of acquisition, or if it is sold, such costs shall be deducted from the sale price in accounting for the property sold. If purchases or sales are abandoned, the preliminary costs included herein (including options paid, if any) shall be charged to the Nonoperating Income and Expense account.

§ 76.1133 Instructions for cable services plant accounts.

(a) *Purpose of cable services plant accounts.*

(1) The cable services plant accounts (1134 to 1138 inclusive) are designed to show the investment in the reporting company's tangible and intangible cable services plant which ordinarily has a service life of more than one year, including such plant whether used by the company or others in providing cable service.

(2) The cable services plant accounts shall not include the cost or other value that cable plant contributed to the company. Contributions in the form of money or its equivalent toward the construction of cable services plant shall be credited to the accounts charged with the cost of such construction. Amounts of non-recurring reimbursements based on the cost of plant or equipment furnished in rendering service to a customer shall be credited to the accounts charged with the cost of the plant or equipment. Amounts received for construction which are ultimately to be repaid wholly or in part, shall be credited to the Other Deferred Credits account; when final determination has been made as to the amount to be returned, any unrefunded amounts shall be credited to the accounts charged with the cost of such construction. Amounts received for the construction of plant, the ownership of which rests with or will revert to others, shall be credited to the accounts charged with the cost of such construction.

(b) *Cable services plant acquired.*

(1) Property, plant and equipment acquired from an entity, whether or not affiliated with the accounting company, shall be accounted for at original cost.

(2) The accounting for property plant and equipment to be recorded at original cost shall be as follows:

(i) The amount of money paid (or current money value of any consideration other than money exchanged) for the property (together with preliminary expenses incurred in connection with the acquisition) shall be charged to the Deferred Charges account.

(ii) The original cost, estimated if not known, of cable services plant, governmental franchises and other similar rights acquired shall be charged to the applicable cable services plant accounts, Cable Services Plant Under Construction, and Property Held for Future Use as appropriate, and credited to the Deferred Charges account. When the actual original cost cannot be determined and estimates are used, the company shall be prepared to furnish the Commission with the particulars of such estimates.

(iii) Depreciation and amortization of plant acquired shall be credited to the Accumulated Depreciation account, the Accumulated Depreciation-Held for Future Cable Services Use account, the Accumulated Amortization--Tangible account, the Accumulated Amortization--Capitalized Leases account, the Accumulated Amortization--Leasehold Improvements account, the Accumulated Amortization--Intangibles account and the Accumulated Amortization--Other account, and debited to the Deferred Charges account.

(iv) Any amount remaining in the Deferred Charges account, applicable to the plant acquired, shall, upon completion of the entries provided in paragraphs (b)(2)(i), (ii) and (iii) of this section, be debited or credited, as applicable to the Goodwill account, or the Plant Adjustment account, as appropriate.

(3) A memorandum record shall be kept showing the amount of contributions in aid of construction applicable to the property acquired as shown by the accounts of the previous owner.

(c) *Cost of construction.*

(1) Cable services plant represents an economic resource which will be used to provide future services, the cost of which will be allocated in a rational and systematic manner to the future periods in which it provides benefits. In accounting for construction costs, the reporting company shall charge to the cable services plant accounts, where applicable, all direct and indirect costs.

(2) Direct and indirect costs shall include, but not be limited to the following:

(i) "Labor," which includes the wages and expenses of employees directly engaged in or in direct charge of construction work. It includes expenses directly related to an employee's wages, such as worker's compensation insurance, payroll taxes, benefits and other similar items of expense.

(ii) "Engineering," which includes the portion of the wages and expenses of engineers, draftsmen, inspectors, and their direct supervision applicable to construction work. It includes expenses directly related to an employee's wages, such as worker's compensation insurance, payroll taxes, benefits and other similar items of expense.

(iii) "Material and supplies," which includes the purchase price of material used at the point of free delivery plus the costs of inspection, loading and transportation, and an equitable portion of provisioning expense. In determining the cost of material used, proper allowance shall be made for unused material, for material recovered from temporary structures used in performing the work involved, and for discounts allowed and realized in the purchase of material. This item does not include construction material that is stolen or rendered unusable due to vandalism. Such material should be charged to the applicable plant specific operations expense accounts.

(iv) "Transportation," which includes the cost of transporting employees, material and supplies, tools and other work equipment to and from the physical construction location. It includes amounts paid therefor to other companies or individuals and the cost of using the company's own motor vehicles or other transportation equipment.

(v) "Contract work," which includes amounts paid for work performed under contract or other agreement by other companies, firms or individuals; engineering and supervision applicable to such work; cost incident to the award of contracts; and the inspection of such work. The cost of construction work performed by affiliated companies and other details relating thereto shall be available from the work in progress and supporting records.

(vi) "Protection," which includes the cost of protecting the company's property from fire or other casualties and the cost of preventing damages to others or the property of others.

(vii) "Privileges, Permits and Rights of Way," which includes such costs incurred in obtaining these privileges, permits, or rights of way in connection with construction work, such as for use of private property, streets or highways. The cost of such privileges and permits shall be included in the cost of the work for which the privileges or permits are obtained, except for costs includable in the Land account and the Intangibles account.

(viii) "Taxes," which includes taxes properly includable in construction costs before the facilities are completed for service, which taxes are assessed separately from taxes on operating property or under conditions that permit separate identification of the amount chargeable to construction.

(ix) "Special machine service," which includes the cost of labor expended, materials and supplies consumed and other expenses incurred in the maintenance, operation and use of special and other labor saving machines (other than transportation equipment) such as trenching equipment, cable plows and pole setting trucks. Also included are expenditures for rental, maintenance and operation of such machines owned by others. When a construction job requires the purchase of special machines, the cost thereof, less the appraised or salvage value at the time of release from the job, shall be included in the cost of construction.

(x) "Insurance," which includes premiums paid specifically for protection against loss and damage in connection with the construction of cable services plant due to fire or other casualty, injury to or death of employees or others, damages to property of others, defalcations of employees and agents, and the nonperformance of contractual obligations of others.

(xi) "Construction services," which includes the cost of cable, electricity, power, construction quarters, office space and equipment directly related to the construction project.

(xii) "Indirect construction costs," which includes indirect costs such as general engineering, supervision and support. Such costs, in addition to direct supervision, shall include indirect plant operations and engineering supervision up to, but not including, supervision by executive officers whose pay and expenses are chargeable to the Executive and Planning account. The records supporting the entries for indirect construction cost shall be kept so as to show the nature of the expenditures, the individual jobs and accounts charged, and the bases of the distribution. The amounts charged to each plant account for indirect costs shall be readily determinable. The instructions contained herein shall not be interpreted as permitting the addition to plant of amounts to cover indirect costs based on arbitrary allocations.

(xiii) The cost of construction shall not include any amounts classifiable as Corporate Operations Expense.

§ 76.1134 Cable services plant in service.

This account shall include the original cost of the investment included in Accounts 1139 through 1151.

§ 76.1135 Property held for future use.

(a) This account shall include the original cost of property owned and held for no longer than two years under a definite plan for use in cable service. If at the end of two years the property is not in service, the original cost of the property shall be transferred to the Nonoperating Plant account.

(b) Subsidiary records shall be maintained to show the character of the amounts carried in this account.

§ 76.1136 Cable services plant adjustment.

(a) This account shall include amounts determined in accordance with § 1133(b) of this subpart representing the difference between

(1) the fair market value of the cable services plant acquired, plus preliminary expenses incurred in connection with the acquisition; and

(2) the original cost of such plant, governmental franchises and similar rights acquired, less the amounts of reserve requirements for depreciation and amortization of the property acquired. If the actual original cost is not known, the entries in this account shall be based upon an estimate of such costs.

(b) The amounts recorded in this account with respect to each property acquisition (except land and artworks) shall be disposed of, written off, or provision shall be made for the amortization thereof, as follows:

(1) Debit amounts may be charged to,in whole or in part, or amortized over a reasonable period through charges to the Other Nonoperating Income Account. When the provisions of paragraph (b)(3) of this section apply, debit amounts shall be amortized to the Amortization Expense--Other account.

(2) Credit amounts shall be disposed of in such manner as this Commission may approve or direct, except for credit amounts referred to in paragraph (b)(3) of this section.

(3) Within one year from the date of inclusion in this account of a debit or credit amount with respect to a current acquisition, the company may dispose of the total amount from an acquisition of cable services plant by a lump-sum charge or credit, as appropriate, to the Amortization Expense - Other account without further approval of this Commission, provided that such amount does not exceed $100,000 and that the plant was not acquired from an affiliated company.

§ 76.1137 Nonoperating plant.

(a) This account shall include the company's investment in regulated property which is not includable in the plant accounts as operating cable services plant. It shall include the company's investment in cable services property held for sale.

(b) Subsidiary records shall be maintained to show the character of the amounts carried in this account.

§ 76.1138 Goodwill.

This account shall include any portion of the plant purchase price that cannot be assigned to specifically identifiable property acquired and such amount should be identified as "goodwill".

§ 76.1139 Land.

(a) This account shall include the original cost of all land held in fee and of easements, and similar rights in land having a term of more than one year used for purposes other than the location of outside plant. It shall also include special assessments upon land for the construction of public improvements.

(b) When land, together with buildings thereon, is acquired, the original cost shall be fairly apportioned between the land and the buildings and accounted for accordingly. If the plan of acquisition contemplates the removal of buildings, the total cost of the land and buildings shall be accounted for as the cost of the land, and the salvage value of the buildings when disposed of shall be deducted from the cost of the land so determined.

(c) Annual or more frequent payments for use of land shall be recorded in the rent subsidiary record category for the Land and Building Expense.

(d) When land is acquired for which there is not a definite plan for its use in cable service, its costs shall be included in the Nonoperating Plant account.

(e) When land is acquired in excess of that required for cable purposes, the cost of such excess land shall in included in the Nonoperating Plant account.

(f) Installments of assessments for public improvement, including interest, if any, which are deferred without option to the company shall be included in this account only as they become due and payable. Interest on assessments which are not paid when due shall be included in the Interest and Related Items account.

§ 76.1140 Buildings.

(a) This account shall include the original cost of buildings, and the cost of all permanent fixtures, machinery, appurtenances and appliances installed as a part thereof. It shall include costs incident to the construction or purchase of a building and to securing possession and title.

(b) When land, together with the buildings thereon, is acquired, the original cost shall be fairly apportioned between the land and buildings, and the amount applicable to the buildings shall be included in this account. The amount applicable to the land shall be included in the Land account.

(c) This account shall not include the cost of any cable services equipment or wiring apparatus for generating or controlling electricity for operating the cable system.

§ 76.1141 Head End Equipment.

This account shall include the original cost of head end equipment. It shall include the original cost of towers and antennas comprising the headend tower assemblies or arrays, headend receiving and signal processing equipment, all power supply and distribution equipment serving as or associated with the prime source of power used in headend operations, and miscellaneous equipment devoted to general station use.

§ 76.1142 Distribution system.

(a) This account shall include the following:

(1) The original cost installed of towers and poles together with appurtenant fixtures used for supporting overhead distribution conductors and service wires;

(2) The original cost installed of underground conduit and tunnels used for housing distribution cables or wires.

(3) The original cost installed of conductors and devices for distribution purposes.

(4) The original cost of all power supply and distribution equipment serving as or associated with the prime source of power used in signal distribution. This account shall include also the cost of power rectifieres

or motor generator installations (not forming an integral part of the transmitting or head end stations) that are provided as a source of power for the distribution system.

§ 76.1143 Drops

This account shall include the original cost of overhead and underground conductors leading from the pressure tap to the point of connection with the customers outlet or wiring. This account includes conduit used for underground service conductors.

§ 76.1144 Production equipment.

This account shall include the original cost of all production equipment owned by the reporting company that is used for the production of programming, including public, educational, and governmental access and local origination programming.

§ 76.1145 Customer premises equipment.

This account shall include the original cost of equipment on customers' premises, leased or loaned to customers, but not including property held for sale. This account also shall include the cost installed of equipment on customer's premises when the reporting company incurs such cost and when the reporting company retains title to and assumes full responsibility for maintenance and replacement of such property.

§ 76.1146 Maintenance and warehouse equipment.

(a) This account shall include the original cost of the following:

(1) Motor vehicles of the type which are designed and routinely licensed to operate on public streets and highways.

(2) Special purpose vehicles.

(3) Tools and equipment used to maintain items included in subsection (1), (2) and (4) of this section.

(4) Power operated equipment, general purpose tools and other items of work equipment.

§ 76.1147 Furniture.

This account shall include the original cost of furniture in offices, storerooms, shops, and all other quarters. This account shall also include the cost of objects which possess aesthetic value, are of original or limited edition, and do not have a determinable useful life. The cost of any furniture attached to and constituting a part of a building shall be charged to the Buildings account.

§ 76.1148 Office equipment.

This account shall include the original cost of office equipment in offices, shops and all other quarters. The cost of any equipment attached to and constituting a part of a building shall be charged to the Building account.

§ 76.1149 Capital leases.

(a) This account shall include all property acquired under a capital lease. A lease qualifies as a capital lease when one or more of the following criteria is met:

(1) By the end of the lease term, ownership of the leased property is transferred to the leasee.

(2) The lease contains a bargain purchase option.

(3) The lease term is substantially (75% or more) equal to the estimated useful life of the leased property. However, if the beginning of the lease term falls within the last 25% of the total estimated economic life of the leased property, including earlier years of use, this criterion shall not be used for purposes of classifying the lease.

(4) At the inception of the lease, the present value of the minimum lease payments, excluding that portion of the payments representing executory costs to be paid by the lessor, including any profit thereon, equals or exceeds 90% or more of the fair value of the leased property. However, if the beginning of the lease term falls within the last 25% of the total estimated economic life of the leased property, including earlier years of use, this criterion shall not be used for purposes of classifying the lease.

(b) All other leases are operating leases.

(c) The amounts recorded in this account at the inception of a capital lease shall be equal to the original cost, if known, or to the present value not to exceed fair value, at the beginning of the lease term, of minimum lease payments during the lease term, excluding that portion of the payments representing executory costs to be paid by the lessor, together with any profit thereon.

§ 76.1150 Leasehold improvements.

(a) This account shall include the original cost of leasehold improvements made to cable services plant held under a capital or operating lease, which are subject to amortization treatment. This account shall also include those improvements which will revert to the lessor.

(b) Improvements to leased cable services plant which are of a relatively minor cost or short life or for which the period of the lease is one year or less shall be charged to the account chargeable with the cost of repairs to such plant.

(c) Amounts contained in this account shall be amortized over the term of the related lease.

§ 76.1151 Intangibles.

(a) This account shall include the cost of organizing and incorporating the company, the original cost of government franchises, the original cost of patent rights, and other intangible property having a life of more than one year and used in connection with the company's cable operations.

(b) Subsidiary records for this account shall include a description of each class of intangible property.

(c) The cost of other intangible assets having a life of one year or less shall be charged directly to the Amortization Expense--Intangible account. Such intangibles acquired at small cost may also be charged to the Amortization Expense - Intangibles account, irrespective of their term of life.

(d) This account shall not include any discounts on securities issued, nor shall it include costs incident to negotiating loans, selling bonds or other evidences of debt, or expenses in connection with the authorization, issuance, sale or resale of capital stock.

(e) When charges are made to this account for expenses incurred in mergers, consolidations, or reorganizations, amounts previously included in this account on the books of the various companies concerned shall not be carried over.

(f) Franchise taxes payable annually or more frequently shall be charged to Operating Taxes account.

(g) This account shall not include the cost of plant, material and supplies, or equipment furnished to municipalities or other governmental authorities when given other than as initial consideration for franchises or similar rights.

(h) This account shall not include the original cost of easements, rights of way, and similar rights in land having a term of more than one year. Such amounts shall be recorded in the Land account, or in the appropriate outside plant account.

§ 76.1152 Accumulated depreciation.

(a) This account shall include the accumulated depreciation associated with the investment contained in Cable Services Plant in Service account.

(b) This account shall be credited with depreciation amounts concurrently charged to the Depreciation Expense--Cable Services Plant in Service account.

(c) At the time of retirement of depreciable operating cable services plant, this account shall be charged with the original cost of the property, retired plus the cost of removal and credited with the salvage value and any insurance proceeds recovered.

(d) This account shall be credited with amounts charged to the Deferred Maintenance and Retirements account This account shall be credited with amounts charged to the Depreciation Expense - Cable Services Plant in Service account with respect to other than relatively minor losses in service values suffered through terminations of service when charges for such terminations are made to recover the losses.

§ 76.1153 Accumulated depreciation held for future use.

(a) This account shall include the accumulated depreciation associated with the investment contained in the Property Held for Future Use account.

(b) This account shall be credited with amounts concurrently charged to the Depreciation and Amortization Expenses account.

§ 76.1154 Accumulated depreciation--non-operating.

(a) This account shall include the accumulated amortization and depreciation associated with the investment contained in the Nonoperating Plant account.

(b) This account shall be credited with amortization and depreciation amounts concurrently charged to the Nonoperating Income and Expense account.

(c) When nonoperating plant not previously used in cable service is disposed of, this account shall be charged with the amount previously credited hereto with respect to such property and the book cost of the property so retired less the amount chargeable to this account and less the value of the salvage recovered or the proceeds from the sale of the property shall be included in the Nonoperating Income and Expense account. In case the property had been used in cable service previous to its inclusion in the Nonoperating Plant account, the amount accrued for depreciation thereon after its retirement from cable service shall be charged to this account and credited to the Accumulated Depreciation account, and the accounting for its retirement

from the Nonoperating Plant account shall be in accordance with that applicable to cable services plant retired.

§ 76.1155 Accumulated amortization--capitalized leases.

(a) This account shall include the accumulated amortization associated with the investment contained in the Capital Leases account.

(b) This account shall be credited with amounts for the amortization of capital leases concurrently charged to the Amortization Expense--Tangible account. (Note also the Accumulated Depreciation--Nonoperating account.)

(c) When any item carried in the Capital Leases account is sold, is relinquished, or is otherwise retired from service, this account shall be charged with the cost of the retired item. Remaining amounts associated with the item shall be debited to the Nonoperating Income and Expense account.

§ 76.1156 Accumulated amortization--leasehold improvements.

(a) This account shall include the accumulated amortization associated with the investment contained in the Leasehold Improvements account.

(b) This account shall be credited with amounts for the amortization leasehold improvements concurrently charged to the Amortization Expense--Tangible account. (Note also the Accumulated Depreciation--Nonoperating account.)

(c) When any item carried in the Leasehold Improvements account is sold, is relinquished, or is otherwise retired from service, this account shall be charged with the cost of the retired item. Remaining amounts associated with the item shall be debited to the Nonoperating Income and Expense account.

§ 76.1157 Accumulated amortization--intangible.

(a) This account shall include the accumulated amortization associated with the investment contained in the Intangibles account.

(b) This account shall be credited with amortization amounts concurrently charged to the Amortization Expense--Intangible account. (Note also the Accumulated Depreciation--Nonoperating account.)

(c) When any item carried in the Intangibles account is sold, relinquished, or otherwise retired from service, this account shall be charged with the cost of the retired item. Remaining amounts associated with the item shall be debited to the Nonoperating Income and Expense account.

§ 76.1158 Accumulated amortization--other.

(a) This account shall include the accumulated amortization associated with the investment contained in the Plant Adjustment account.

(b) This account shall be credited with amortization amounts concurrently charged to the Amortization Expense--Other. (Note also the Accumulated Depreciation--Nonoperating account.)

(c) When any item carried in the Plant Adjustment account is sold, relinquished, or otherwise retired from service, this account shall be charged with the cost of the retired item. Remaining amounts associated with the item shall be debited to the Nonoperating Income and Expense account.

§ 76.1159 Accounts payable.

(a) This account shall include all amounts currently due to others for recurring trade obligations, and not provided for in other accounts, such as those for material and supplies, repairs to cable services plant, matured rents, and interest payable under monthly settlements on short-term loans,

advances, and open accounts. It shall also include amounts of taxes payable that have been withheld from employees' salaries.

(b) Subsidiary record categories shall be maintained for this account in order that the company may separately report the amounts contained herein that relate to nonaffiliates and affiliates.

(c) There shall be included herein accounts payable arising from sharing of revenues.

§ 76.1160 Notes payable.

(a) This account shall include the face amount of notes, drafts, and other evidences of indebtedness issued or assumed by the company (except interest coupons) which are payable on demand or not more than one year or less from date of issue.

(b) Subsidiary record categories shall be maintained for this account in order that the company may separately report the amounts contained herein that relate to nonaffiliates and affiliates.

(c) If any part of an obligation, otherwise includable in this account matures more than one year from date of issue, it shall be included in the Funded Debt account, the Advances from Affiliated Companies account, or other appropriate account.

(d) The records supporting the entries to this account shall be kept so that the company can furnish complete details as to each note, when it is issued, the consideration received, and when it is payable.

§ 76.1161 Advance billing and payments.

This account shall include the amount of advance billing creditable to revenue accounts in future months; also advance payments made by prospective customers prior to the establishment of service. Amounts included in this account shall be credited to the appropriate revenue accounts in the months in which the service is rendered or cleared from this account as refunds are made.

§ 76.1162 Customers' deposits.

(a) This account shall include the amount of cash deposited with the company by customers as security for the payment for cable services.

(b) Advance payments made by prospective customers prior to the establishment of service shall be credited to the Advance Billing and Payments account.

§ 76.1163 Current maturities--long-term debt.

This account shall include the amount (including any obligations for premiums) of long-term debt matured and unpaid without any specific agreement for extension of maturity, including unpresented bonds drawn for redemption through the operation of sinking and redemption fund agreements.

§ 76.1164 Current maturities--capital leases.

This account shall include the current portion of obligations applicable to property obtained under capital leases.

§ 76.1165 Income taxes--accrued.

(a) This account shall be credited or charged with the offsetting amount of current year income taxes (Federal, state and local) accrued during the period or adjustments to prior accruals.

(b) If significant, current year income taxes paid in advance shall be reclassified to the Prepayments account.

§ 76.1166 Other taxes--accrued.

(a) This account shall be credited or charged and the Operating Taxes account, or the Nonoperating Taxes account, or, for payroll related costs, the appropriate expense accounts shall be charged or credited for all taxes, other than Federal, State and local income taxes, accrued or adjusted for previous accruals during the period. Among the taxes includable in this account are property, gross receipts, franchise, capital stock, social security and unemployment taxes.

(b) Taxes paid in advance of the period in which they are chargeable to income shall be included in the Prepayments account or the Other Noncurrent Assets account, as appropriate.

§ 76.1167 Net current deferred operating income taxes.

(a) This account shall include the balance of income tax expense related to current items from regulated operations which have been deferred to later periods as a result of the normalized method of accounting for tax differentials authorized by this Commission and not provided for elsewhere.

(b) As regulated assets or liabilities which generated the deferred income tax are reclassified from long-term or noncurrent status to current, the appropriate deferred income tax shall be reclassified from the Net Noncurrent Deferred Operating Income Taxes account, to this account.

(c) This account shall be debited or credited with the amount being debited or credited to the Provision for Deferred Operating Income Taxes--Net account.

(d) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the tax timing difference.

(e) Subsidiary record categories shall be maintained in order that the company may separately report the amounts contained herein that are property related and those that are nonproperty related.

§ 76.1168 Net current deferred nonoperating income taxes.

(a) This account shall include the balance of income tax expense resulting from comprehensive interpreted tax allocation which has been deferred to later periods.

(b) As other assets or liabilities which generated the deferred income tax are reclassified from long-term or noncurrent status to current, the appropriate deferred income tax shall be reclassified from the Net Noncurrent Deferred Nonoperating Income Taxes account, to this account.

(c) This account shall be debited or credited with the amount being credited or debited to the Provision for Deferred Nonoperating Income Taxes--Net account.

(d) This account shall also include the balance of the income taxes (Federal, state and local) related to current extraordinary items which have been deferred to later periods resulting from comprehensive interperiod tax allocation.

(e) As the extraordinary item which generated the deferred income tax becomes current, the appropriate deferred income tax shall be reclassified

from the Net Noncurrent Deferred Nonoperating Income Taxes account, to this account.

(f) This account shall be debited or credited with the amount being credited and debited to the Extraordinary Items account.

(g) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround.

(h) Subsidiary record categories shall be maintained in order that the company may separately report the amounts contained herein that are property related and those that are nonproperty related.

§ 76.1169 Other accrued liabilities.

(a) This account shall include the amount of wages, compensated absences, interest on indebtedness of the company, dividends on capital stock, and rents accrued to the date for which the balance sheet is made, but not payable until after that date.

(b) This account shall be maintained so as to show separately the amount and nature of the items accrued to the date of the balance sheet.

(c) Matured rents, dividends and interest shall be included in the Accounts Payable account.

(d) Interest payable under monthly settlements on short-term loans, advances, and open accounts shall be included in the Accounts Payable account.

§ 76.1170 Other current liabilities.

This account shall include liabilities of current character which are not includable in Accounts 1160 through 1169.

§ 76.1171 Funded debt.

(a) This account shall include the total face amount of unmatured debt, maturing more than one year from date of issue, issued by the company and not retired, and the total face amount of similar unmatured debt of other companies, the payment of which has been assumed by the company, including funded debt the maturity of which has been extended by specific agreement.

(b) This account shall include such items as mortgage bonds, collateral trust bonds, income bonds, convertible debt, debt securities with detachable warrants and other similar obligations maturing more than one year from date of issue.

(c) In the case of debt securities with detachable warrants this account shall include only the face amount of the security at the time of issuance. The value of detachable warrants shall be charged to either the Premium on Long-Term Debt account, or the Discount on Long-Term Debt account, as appropriate, and credited to the Additional Paid-in Capital account, in the case of capital stock warrants or retained in this account as a separately identifiable amount in the case of detachable long-term debt warrants. No similar allocation shall be made for the issuance of either convertible debt or debt securities with non-detachable warrants.

(d) Subsidiary records shall be maintained for each issue.

(e) Securities maturing in one year or less, including securities maturing serially, shall be included in the Current Maturities--Long-Term Debt account.

(f) Investment advances, including those represented by notes, shall be included in the Other Long-Term Debt account.

§ 76.1172 Premium on long-term debt.

(a) This account shall include the premium associated with all classes of long-term debt. Premium, as applied to securities issued or assumed by the company, means the excess of the current money value received at their sale over the sum of their book or face amount and interest or dividends accrued at the date of the sale.

(b) Amounts included in this account shall be amortized monthly by the interest method and credited to the Interest and Related Items account.

(c) Subsidiary records shall be maintained to identify the premium attributable to each issue.

§ 76.1173 Discount on long-term debt.

(a) This account shall include the discount associated with all classes of long-term debt. Discount, as applied to securities issued or assumed by the company, means the excess of the book or face amount of the securities plus interest or dividends accrued at the date of the sale over the current money value of the consideration received at their sale.

(b) Amounts included in this account shall be amortized monthly by the interest method and charged to the Interest and Related Items account.

(c) Subsidiary records shall be maintained to identify the discount attributable to each issue.

§ 76.1174 Reacquired debt.

This account shall include the face amount of debt reacquired prior to maturity that has not been retired. Gain or loss shall be recognized at the time of reacquisition by credits or charges to the Nonoperating Income and Expense account, except that material gains or losses shall be treated as extraordinary. (See Extraordinary Income Credits account and Extraordinary Items account.)

§ 76.1175 Obligations under capital leases.

(a) This account shall include the noncurrent portion of obligations applicable to property obtained under capital leases.

(b) Amounts subject to current settlement shall be included in the Current Maturities--Capital Leases account.

§ 76.1176 Advances from affiliated companies.

(a) This account shall include the amount of advances from affiliated companies.

(b) Amounts due affiliated companies which are subject to current settlement shall be included in the Notes Payable account or the Accounts Payable account, as appropriate.

§ 76.1177 Other long-term debt.

This account shall include long-term debt not provided for elsewhere.

§ 76.1178 Other long-term liabilities.

(a) This account shall include amounts accrued to provide for such items as unfunded pensions (if actuarially determined), death benefits, deferred compensation costs and other long-term liabilities not provided for elsewhere.

(b) Subsidiary records shall be maintained to identify the nature of the items included herein.

§ 76.1179 Unamortized operating investment tax credits--net.

(a) This account shall be credited and the Operating Taxes account shall be debited with investment tax credits generated from qualified expenditures related to regulated operations which the company defers rather than recognizes currently in income.

(b) This account shall be debited and the Operating Taxes account credited with a proportionate amount determined in relation to the period of time used for computing book depreciation on the property to which the tax credit relates.

§ 76.1180 Unamortized nonoperating investment tax credits--net.

(a) This account shall be credited and the Nonoperating Taxes account, shall be debited with investment tax credits generated from qualified expenditures related to other operations which the company has elected to defer rather than recognize currently in income.

(b) This account shall be debited and the Nonoperating Taxes account credited with a proportionate amount determined in relation to the useful book life of the property to which the tax credit relates.

§ 76.1181 Net noncurrent deferred operating income taxes.

(a) This account shall include the balance of income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation related to timing differences that arise from regulated operations.

(b) This account shall be credited or debited, as appropriate, and the Operating Taxes account shall reflect the offset for the tax effect of revenues and expenses from regulated operations which have been included in the determination of taxable income, but which will not be included in the determination of book income or for the tax effect of revenues and expenses from regulated operations which have been included in the determination of book income prior to the inclusion in the determination of taxable income.

(c) As regulated assets or liabilities which generated the prepaid income tax or deferred income tax are reclassified from long-term or noncurrent status to current status, the appropriate deferred income tax shall be reclassified from this account to the Net Current Deferred Operating Income Taxes account.

(d) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the tax timing difference.

(e) Subsidiary record categories shall be maintained in order that the company may separately report the amounts contained herein that are property related and those that are nonproperty related.

§ 76.1182 Net noncurrent deferred nonoperating income taxes.

(a) This account shall include the balance of income tax expense (Federal, state and local) that has been deferred to later periods as a result of comprehensive interperiod tax allocation related to nonoperating timing differences.

(b) This account shall be credited or debited, as appropriate, and the Nonoperating Taxes account, shall reflect the offset for the tax effect of

revenues from other operations and extraordinary items and nonoperating expense which have been included in the determination of taxable income, but which will not be included in the determination of book income or for the tax effect of nonoperating expenses and extraordinary items and nonoperating income which have been included in the determination of book income prior to the inclusion in the determination of taxable income.

(c) As other assets or liabilities which generated the prepaid income tax or deferred income tax are reclassified from long-term or non-current status to current status, the appropriate deferred income tax shall be reclassified from this account to the Net Current Deferred Nonoperating Income Taxes account.

(d) This account shall also include the balance of the income tax effect (Federal, State and local) related to noncurrent extraordinary items which have been included in the determination of taxable income in a period different from when it is included in the determination of book income, that is, more than one year.

(e) This account shall be charged or credited with the contra amount recorded to the Extraordinary Items account.

(f) As the extraordinary item which generated the deferred income tax becomes current, the appropriate deferred income tax shall be reclassified from this account to the Net Current Deferred Nonoperating Income Taxes account.

(g) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the tax timing difference.

(h) Subsidiary record categories shall be maintained in order that the company may separately report the amounts contained herein that are property related and those that are nonproperty related.

§ 76.1183 Other deferred credits.

This account shall include the amount of all deferred credits not provided for elsewhere, such as amounts awaiting adjustment between accounts; and revenue, expense, and income items in suspense.

§ 76.1184 Capital stock

(a) This account shall include the par value, stated amount, or in the case of no-par stock, the amount received for capital stock issued and outstanding.

(b) Subsidiary records shall be maintained so as to show separately each class of stock.

(c) This account shall be charged with the book amount of any stock retired.

§ 76.1185 Additional paid-in capital.

(a) This account shall include the difference between the net proceeds (including discount, premium and stock issuance expense) received from the issuance of capital stock and the amount includable in the Capital Stock account, unless such difference results in a debit balance for that class of stock, in which case the amount shall be charged to the Retained Earnings account.

(b) This account shall also include gains arising from the retirement and cancellation of capital stock. Losses from the retirement and

cancellation of capital stock shall be charged to this account to the extent that there exist credits in this account for the same class of stock; otherwise to the Retained Earnings account.

§ 76.1186 Treasury stock.

This account shall include the cost of the company's own capital stock which has been issued and subsequently reacquired but not retired or resold.

§ 76.1187 Other capital.

This account shall include amounts which are credits arising from the donation by stockholders of the company's capital stock, capital recorded upon the reorganization or recapitalization of the company and temporary declines in the value of marketable securities held for investment purposes. (See also the Investment in Affiliated Companies account.)

§ 76.1188 Retained earnings.

(a) This account shall include the undistributed balance of retained earnings derived from the operations of the company and from all other transactions not includable in the other accounts appropriate for inclusion of stockholders' equity.

(b) Subsidiary records shall be maintained wherein are recorded all entries to retained earnings during the year such that the detail of the entries may be disclosed to the Commission.

§ 76.1189 Instructions for Revenue Accounts.

(a) *Purpose of revenue accounts.* The revenue accounts are intended to include the actual cash inflows (or equivalents) that have or will occur as a result of the company's ongoing major or central operations during the period. They will include the revenues which arise from furnishing regulating cable services such as basic cable services, cable programming services, equipment and installation, and nonregulated cable services such as pay per view, and pay per channel services.

(b) *Deductions from revenue.* Corrections of overcharges, authorized refunds of overcollections previously credited to revenue, authorized refunds and adjustments on account of failure in service, and other corrections shall be charged to the revenue account previously credited with the amounts involved.

(c) *Commissions.* Commissions paid to others or employees in place of compensation or salaries for services rendered shall be charged to the Customer Services account, and not to the revenue accounts.

(d) *Revenue recognition.* Credits shall be made to the appropriate revenue accounts when such revenue is actually earned. When the billing cycle encompasses more than one accounting period, adjustments are necessary to properly recognize the revenue applicable to the current accounting period under report. Revenues recorded under the terms of two-tier contracts or other variable payment plans should be deferred, if necessary, and recognized ratably with expenses over the term of related contract. Any amounts deferred shall be credited to the Other Deferred Credits account.

(e) *Structure of revenue accounts.*

(1) The revenue section of the system of accounts shall be organized by revenue group summary account, account and subsidiary record category (if required).

(2) The revenue section of this system of accounts shall be comprised of five major groups--Basic Service Revenues, Cable Programming Service Revenues, Equipment and Installation Revenues,

Nonregulated Cable Programming Service Revenues, Other Cable Revenues, Noncable Revenues, and Uncollectible Revenues.

(3) Summary accounts within revenue groups shall be used to describe aggregations of two or more accounts having a certain commonality.

§ 76.1190 Basic service tier revenues.

(a) This account shall report all revenues derived from the provision basic cable service as defined by § 76.901(a) of this Part. These revenues shall include:

(1) Revenues derived from subscriptions to basic cable;

(2) Revenues derived from advertising on channels carried on the basic cable service tier; and

(3) Other revenues derived from basic cable services.

§ 76.1191 Cable programming services revenues.

(a) This account shall report all revenues derived from the provision cable programming services as defined by § 76.901(b) of this Part. These revenues shall include:

(1) Revenues derived from subscriptions to cable programming services;

(2) Revenues derived from advertising on channels carried on the cable programming services tiers; and

(3) Other revenues derived from cable programming services.

§ 76.1192 Equipment and installation revenues.

(a) This account shall include all revenues derived from the following activities:

(1) Customer service installation fees.

(2) Lease of basic converters.

(3) Lease of one-way addressable converters.

(4) Lease of two-way addressable converters.

(5) Lease of remotes.

76.1193 Nonregulated cable programming services.

(a) This account shall include all revenues from the provision of any cable service other than basic cable service and cable programming service, such as, per-channel or per-program premium services. These revenues shall include:

(1) Revenues derived from subscriptions to other cable programming services;

(2) Revenues derived from advertising on channels carried on other cable programming services; and

(3) Other revenues derived from other cable programming services.

76.1194 Other cable revenues.

This account shall include all revenues that are derived from the provision of cable services that are not derived from basic cable services, cable programming services or nonregulated cable programming services. Other cable revenues include revenues from leased access, billing and collection services, studio equipment engineering and rental services, sale of equipment, and maintenance of equipment sold to customers.

§ 76.1195 Uncollectible revenue--cable services.

This account shall be charged with amounts concurrently credited to the Receivable Allowances--Cable Services account.

§ 76.1196 Uncollectible revenue--other.

This account shall be charged with amounts concurrently credited to the Other Accounts Receivable account or the Accounts Receivable Allowance--Other account, when such allowance is maintained.

§ 76.1197 Instructions for Expense Accounts.

(a) *Structure of the expense accounts.*

(1) The expense section of the system of accounts shall be organized by expense group summary account, and subsidiary record category (if required).

(2) The expense section of this system of accounts shall be comprised of four major expense groups--Plant Specific Operations, Plant Nonspecific Operations, Customer Operations and Corporate Operations. Expenses to be recorded in Plant Specific and Plant Nonspecific Operations Expense Groups generally reflect cost associated with the various kinds of equipment identified in the plant asset accounts. Expenses to be recorded in the Customer Operations and Corporate Operations accounts reflect the costs of, or all associated with, functions performed by people, irrespective of the organization in which any particular function is performed.

(3) Summary accounts within expense groups shall be used to describe aggregations of two or more accounts having a certain commonality.

(b) *Plant Specific Operations Expense.*

(1) The Plant Specific Operations Expense Accounts are used to record costs related to specific kinds of cable services plant.

(2) The Plant Specific Operations Expense accounts predominantly mirror the cable services plant in service detail accounts and are numbered consistently with them; the first two digit of the expense account being one, eight (18) and the remaining digits being the same as the last two numbers of the related plant account. In classifying Plant Specific Operations expenses, the text of the corresponding plant account should be consulted to ensure appropriateness.

(3) The Plant Specific Operations Expense accounts shall include the costs of inspecting, testing and reporting on the condition of cable plant to determine the need for repairs, replacements, rearrangements and changes; performing routine work to prevent trouble, replacing items of plant other than retirement units; rearranging and changing the location of plant not retired; repairing material for reuse; restoring the condition of plant damaged by storms, floods, fire or other casualties (other than the cost of replacing retirement units); inspecting after repairs have been made; and receiving training to perform these kinds of work. Also included are the costs of direct supervision (immediate or first-level) and office support of this work.

(4) In addition to the activities specified in paragraph (b)(3) of this section, the appropriate Plant Specific Operations Expense accounts shall include the cost of personnel whose principal job is the operation of plant equipment. However, when the operation of equipment is performed as part of other identifiable functions (such as the use of office equipment, capital tools or motor vehicles) the operators' cost shall be charged to accounts appropriate for those functions.

(c) *Plant Nonspecific Operations Expense.* The Plant Nonspecific Operations Expense accounts shall include expenses related to property held for future use, provisioning expenses, and depreciation and amortization expenses. Accounts in this group shall include the costs of performing activities described in narratives for individual accounts. These costs shall also include the costs of supervision and office support of these activities.

(d) *Customer Operations Expense.* The Customer Operations Expense accounts shall include the cost of performing customer related marketing and services activities described in narratives for individual accounts. These costs shall also include the costs of supervision, office support and training for these activities.

(e) *Corporate Operations Expense.* The Corporate Operations Expense accounts shall include the costs of performing executive and planning activities and general and administrative activities described in narratives for individual accounts. These costs shall also include the costs of supervision, office support and training for these activities.

(f) *Expense matrix.* The expense accounts shall be maintained by the following subsidiary record categories, as appropriate to each account.

(1) *Salaries and wages.* This subsidiary record category shall include compensation to employees, such as; wages, salaries, commissions, bonuses, incentive awards and termination payments.

(2) Benefits. This subsidiary record category shall include payroll related benefits on behalf of employees such as the following:

Pensions
Savings plan contributions (company portion)
Worker's compensation required by law
Life, hospital, medical, dental, and vision plan insurance
Social Security and other payroll taxes

(3) *Rents.*

(i) This subsidiary record category shall include amounts paid for the use of real and personal operating property. Amounts paid for real property shall be included in Land and Buildings Expense account. This category includes payments for operating leases but does not include payments for capital leases.

(ii) This subsidiary record category is applicable only to the Plant Specific Operations Expense accounts. Incidental rents, e.g., short-term rental car expense, shall be categorized as Other Expenses (see paragraph (f)(4) of this section) under the account which reflects the function for which the incidental rent was incurred.

(4) *Other expenses.* This subsidiary record category shall include costs which cannot be classified to the other subsidiary record categories. Included are material and supplies, including provisioning (note also the Provisioning Expense account); contracted services; accident and damage payments, insurance premiums; traveling expenses and other miscellaneous costs.

(5) *Clearances.* This subsidiary record category shall include amounts transferred to Construction accounts (see § 76.1133 (c)(2)(iii)), the Other Plant Specific Operations Expense account, and/or the Accumulated Depreciation account, as appropriate, from the Maintenance and Warehouse Equipment account.

(g) *Reimbursements.* Reimbursements of actual costs incurred in connection with joint operations or projects repairing plant due to damages by others, and obligations to make changes in cable plant (such as highway relocations), shall be credited to the accounts originally charged.

§ 76.1198 Property held for future use expense.

This account shall include expenses associated with property held for future use.

§ 76.1199 Land and building expense.

This account shall include expenses associated with land and buildings (excluding amortization of leasehold improvements). This account shall also include janitorial service, cleaning supplies, water, sewage, fuel and guard service, and electrical power.

§ 76.1200 Head end equipment expense.

This account shall be charged only with expenses incurred in connection with head end equipment.

§ 76.1201 Distribution system expense.

This account shall be charged only with expenses incurred in connection with the distribution system.

§ 76.1202 Drops expense

This account shall be charged only with expenses incurred in connection with drops.

§ 76.1203 Production equipment expense.

This account shall be charged only with expenses incurred in connection with production equipment.

§ 76.1204 Customer premises equipment expense.

This account shall be charged only with expenses incurred in connection with customer premises equipment.

§ 76.1205 Maintenance and warehouse equipment expense.

(a) This account shall be charged only with expenses incurred in connection with maintenance and warehouse equipment. These expenses shall include:

(1) Motor vehicle expenses such as the costs of fuel, lubrications, license and inspection fees, washing, repainting, and minor accessories. Also included are the costs of personnel whose principal job is operating motor vehicles, such as chauffeurs and shuttle bus drivers. The costs of users of motor vehicles whose principal job is not the operation of motor vehicles shall be charged to accounts appropriate for the activities performed. Credits shall be made to this account for amounts transferred to Construction and/or to other Plant Specific Operations Expense accounts. These amounts shall be computed on the basis of direct labor hours.

(2) Special purpose vehicles expenses such as the costs of fuel, licenses and inspection fees, washing, repainting, and minor accessories. The costs of operators of this equipment shall be charged to accounts appropriate

for the activities performed. Credits shall be made to this account for amounts transferred to Construction and/or to other Plant Specific Operations Expense accounts. These amounts shall be computed on the basis of direct labor hours.

(3) Garage work and equipment expenses.

(4) Other work equipment expenses. Credits shall be made to this account for amounts transferred to Construction and/or to other Plant specific Operations Expense accounts. These amounts shall be computed on the basis of direct labor hours.

§ 76.1206 Furniture and artworks expense.

This account shall include expenses associated with furniture and artworks.

§ 76.1207 Office equipment expense.

This account shall be charged only with costs incurred in connection with the office equipment itself. The costs of operators of this equipment shall be charged to accounts appropriate for the activities performed.

§ 76.1208 Basic cable programming expenses.

This account shall be used for reporting purposes to summarize Accounts _ _1209 through 1213.

§ 76.1209 Basic cable satellite programming expenses

This account shall include all expenses associated with procuring satellite programming on the basic cable tier.

§ 76.1210 Retransmission consent expenses.

This account shall include all expenses associated with retransmission consent on the basic tier.

§ 76.1211 Public, educational, governmental access expense

This account shall include all expenses associated with public, educational, and governmental access.

§ 76.1212 Local origination expense.

This account shall include all expenses associated with local origination programming.

§ 76.1213 Other basic cable programming expenses.

This account shall include all basic cable programming expenses that were not included in Accounts 1209 through 1212.

§ 76.1214 Cable programming service expense.

This account shall be used for reporting purposes to summarize Accounts _ _1215 through 1218.

§ 76.1215 Cable programming service satellite programming expense.

This account shall include all expenses associated with procuring satellite programming on the cable programming service tiers.

§ 76.1216 Cable programming service retransmission consent expense.

This account shall include all expenses associated with retransmission consent on the cable programming service tiers.

§ 76.1217 Cable programming service local origination expense.

This account shall include all expenses associated with local origination programming on the cable programming service tiers.

§ 76.1218 Other cable programming service expense.

This account shall include all cable programming service expenses that were not included in Accounts 1215 through 1218.

§ 76.1219 Depreciation and amortization expenses.

This account shall summarize for reporting purposes the contents of Accounts 1220 through 1225.

§ 76.1220 Depreciation expense--cable services plant in service.

This account shall include the depreciation expense of capitalized costs in Accounts 1139 through 1151, inclusive.

§ 76.1221 Depreciation expense--property held for future cable services use.

This account shall include the depreciation expense of capitalized costs included in the Property Held for Future Cable Services Use account.

§ 76.1222 Amortization expense--tangible.

This account shall include only the amortization of costs included in the Capital Leases account and the Leasehold Improvements account.

§ 76.1223 Amortization expense--intangible.

This account shall include the amortization of costs included in the Intangibles account.

§ 76.1224 Amortization expense--other.

(a) This account shall include only the amortization of costs included in the Cable Services Plant Adjustment account.

(b) This account shall also include lump-sum write offs of amounts of plant acquisition adjustment.

(c) Subsidiary records shall be maintained so as to show that character of the amounts contained in this account.

§ 76.1225 Other property, plant and equipment expenses

(a) This account shall include all expenses associated with the following:

(1) Property held for future cable use expenses; and

(2) Costs incurred in provisioning material and supplies, including office supplies. This includes receiving and stocking, filling requisitions from stock, monitoring and replenishing stock levels, delivery of material, storage, loading or unloading and administering the reuse or refurbishment of material. Also included are adjustments resulting from the annual or more frequent inventory of material and supplies. Credits shall be made to this account for amounts transferred to construction and/or to plant specific operations expense. These costs are to be cleared by adding to the cost of material and supplies a suitable loading charge.

§ 76.1226 Cable system operations expenses.

(a) This account shall include the following expenses associated with operating the cable system:

(1) The cost of electrical power used to operate the cable system.

(2) Costs incurred in testing cable services facilities from a testing facility (test desk or other testing system) to determine the condition of plant on either a routine basis or prior to assignment of the facilities; receiving, recording and analyzing trouble reports; testing to determine the nature and location of reported trouble condition; and dispatching repair persons or otherwise initiating corrective action.

(3) Costs incurred in the general administration of plant operations. This includes supervising plant operations; planning, coordinating and monitoring plant operations; and performing staff work such as developing methods and procedures, preparing and conducting training (except on-the-job training) and coordinating safety programs. Credits shall be made to this account for amounts transferred to Construction accounts. These amounts shall be computed on the basis of direct labor hours.

(4) Costs incurred in the general engineering of the cable services plant which are not directly chargeable to an undertaking or project. This includes developing input to the fundamental planning process, performing preliminary work or advance planning in connection with potential undertakings, and performing special studies of an engineering nature. Credits shall be made to this account for amounts transferred to Construction accounts. These amounts shall be computed on the basis of direct labor hours.

§ 76.1227 Marketing.

(a) This account shall include the following expenses associated with establishing and servicing customer accounts:

(1) Costs incurred in performing administrative activities related to marketing products and services. This includes competitive analysis, product and service identification and specification, test market planning, demand forecasting, product life cycle analysis, pricing analysis, and identification and establishment of distribution channels.

(2) Costs incurred in selling products and services. This includes determination of individual customer needs, development and presentation of customer proposals, sales order preparation and handling, and preparation of sales records.

(3) Costs incurred in developing and implementing promotional strategies to stimulate the purchase of products and services. This excludes nonproduct-related advertising, such as corporate image, stock and bond issue and employment advertisements, which shall be included in the appropriate functional accounts.

§ 76.1228 Customer services.

(a) This account shall include costs incurred in establishing and servicing customer accounts. This includes:

(1) Initiating customer service orders and records;

(2) Maintaining and billing customer accounts;

(3) Collecting and investigating customer accounts, including collecting revenues, reporting receipts, administering collection treatment, and handling contacts with customers regarding adjustments of bills;

(4) Collecting and reporting pay station receipts; and

(5) Instructing customers in the use of products and services.

§ 76.1229 Executive and planning.

(a) This account shall include the following expenses:

(1) Costs incurred in formulating corporate policy and in providing overall administration and management. Included are the pay, fees and expenses of boards of directors or similar policy boards and all board-designated officers of the company and their office staffs, e.g., secretaries and staff assistants.

(2) Costs incurred in developing and evaluating long-term courses of action for the future operations of the company. This includes performing corporate organization and integrated long-range planning, including management studies, options and contingency plans, and economic strategic analysis.

§ 76.1230 General and administrative.

(a) This account shall include the following expenses:

(1) Costs incurred in providing accounting and financial services. Accounting services include payroll and disbursements, property accounting, capital recovery, regulatory accounting (revenue requirements, settlements and corollary cost accounting), non-customer billing, tax accounting, internal and external auditing, capital and operating budget analysis and control, and general accounting (accounting principles and procedures and journals, ledgers, and financial reports). Financial services include banking operations, cash management, benefit investment fund management (including actuarial services), securities management, debt trust administration, corporate financial planning and analysis, and internal cashier services.

(2) Costs incurred in maintaining relations with government, regulators, other companies and the general public. This includes:

(i) Reviewing existing or pending legislation;

(ii) Preparing and presenting information for regulatory purposes;

(iii) Performing public relations and non-product-related corporate image advertising activities;

(iv) Administering relations, including negotiating contracts, but excluding sales contracts; and

(v) Administering investor relations.

(3) Costs incurred in performing personnel administration activities. This includes:

(i) Equal Employment Opportunity and Affirmative Action Programs;

(ii) Employee data for forecasting, planning and reporting;

(ii) General employment services;

(iii) Occupational medical services;

(iv) Job analysis and salary programs;

(v) Labor relations activities;

(vi) Personnel development and staffing services, including counseling, career planning, promotion and transfer programs;

(vii) Personnel policy development;

(viii) Employee communications;

(ix) Benefit administration;

(x) Employee activity programs;

(xi) Employee safety programs; and

(xii) Nontechnical training course development and presentation.

(4) Expenses incurred in providing information management, including costs associated with planning, developing, testing, implementing and maintaining data bases and application systems for computers.

(5) Expenses incurred for the provision of legal services. This includes conducting and coordinating litigation, providing guidance on regulatory and labor matters, preparing, reviewing and filing patents and contracts and interpreting legislation. Also included are court costs, filing fees, and the costs of outside counsel, depositions, transcripts and witnesses.

(6) Expenses incurred in procuring material and supplies, including office supplies. This includes analyzing and evaluating suppliers' products, selecting appropriate suppliers, negotiating supply contracts, placing purchase orders, expediting and controlling orders placed for material, developing standards for material purchased and administering vendor or user claims.

(7) Expenses incurred in making planned search or critical investigation aimed at discovery of new knowledge. It also includes translating research findings into a plan or design for a new product or process or for a significant improvement to an existing product or process, whether intended for sale or use. This excludes making routine alterations to existing products, processes, and other ongoing operations even though those alterations may represent improvements.

(8) Costs incurred in performing other general administrative activities not directly charged to the user, and not provided for in other accounts. This includes providing general reference libraries, food services (e.g., cafeterias, lunch rooms and vending facilities), archives, general security investigation services, operating official private branch exchanges in the conduct of the business, and telecommunications and mail services. Also included are payments in settlement of accident and damage claims, insurance premiums for protection against losses and damages, direct benefit payments to or on behalf of retired and separated employees, accident and sickness disability payments, supplemental payments to employees while in governmental service, death payments, and other miscellaneous costs of a corporate nature. This account excludes the cost of office services, which are to be included in the accounts appropriate for the activities supported.

§ 76.1231 Provision for uncollectible notes receivable.

This account shall be charged with amounts concurrently credited to the Notes Receivable account, or to the Notes Receivable Allowance account, when such allowance is maintained.

§ 76.1232 Instructions for Other Income Accounts

Structure of Other Income Accounts. The Other Income Accounts are designed to reflect both operating and nonoperating income items including

taxes, extraordinary items and other income and expense items not properly included elsewhere.

§ 76.1233 Contents of accounts

Other Operating Income and Expense accounts are intended to record the results of transactions, events or circumstances during the periods which are incidental or peripheral to the major or central operations of the company. They shall include all items of an operating nature as incidental work performed for others not provided for elsewhere. Whenever practicable the inflows and outflows associated with a transaction, event or circumstances shall be matched and the results shown as a net gain or loss.

§ 76.1234 Other operating income and expenses.

(a) This account shall include the following operating income and expenses:

(1) Profits realized from custom work (plant construction) performed for others incident to the company's regulated cable services operations. The records supporting the entries in this account shall be maintained with sufficient particularity to identify separately the revenue and costs associated with each undertaking.

(2) A return on investment for the use of regulated property plant and equipment to provide nonregulated products and services.

(3) All gains and losses resulting from the exchange of foreign currency. Transaction (realized) gains or losses shall be measured based on the exchange rate in effect on the transaction date. Unrealized gains or losses shall be measured based on the exchange rate in effect at the balance sheet date.

(4) Gains or losses resulting from the disposition of land or artworks.

(5) Gains or losses resulting from transactions, events or circumstances which are of an operational nature, but occur irregularly or are peripheral to the major or central operations of the company and not provided for elsewhere.

§ 76.1235 Operating taxes.

(a) The Operating Tax account shall reflect the taxes arising from the central operations of the company.

(b) This account shall be charged and the Unamortized Operating Investment Tax Credits--Net account, shall be credited with investment tax credits generated from qualified expenditures related to regulated operations which the company defers rather than recognizes currently in income.

(c) This account shall be credited and the Unamortized Operating Investment Tax Credits - Net account shall be charged ratably with the amortization of each year's investment tax credits included in the Unamortized Operating Investment Tax Credits - Net account for investment services for ratemaking purposes. Such amortization shall be determined in relation to the period of time used for computing book depreciation on the property with respect to which the tax credits relate.

(d) This account shall be charged and the Income Taxes--Accrued account, shall be credited for the amount of Federal Income Taxes for the current period. This account shall also reflect subsequent adjustments to amounts previously charged. Taxes should be accrued each month on an estimated basis and adjustments made as later data becomes available. Tax credits, other than investment tax credits, if normalized, shall be recorded consistent with the accounting for investment tax credits and shall be amortized to income as directed by this Commission. No entries shall be made to this account to reflect interperiod tax allocations.

(e) This account shall be charged and the Income Taxes-- Accrued account, shall be credited for the amount of state and local income taxes for the current period. This account shall also reflect subsequent adjustments to amounts previously charged. Taxes should be accrued each month on an estimated basis and adjustments made as later data becomes available. No entries shall be made to this account to reflect interperiod tax allocations.

(f) This account shall be charged and the Other Taxes--Accrued account, shall be credited for all taxes, other than Federal, state, and local income taxes and payroll related taxes, related to regulated operations applicable to current periods. Among the items includable in this account are property, gross receipts, franchise and capital stock taxes; this account shall also reflect subsequent adjustments to amounts previously charged.

(g) Special assessments for street and other improvements and special benefit taxes, such as water taxes and the like, shall be included in the operating expense accounts or investment accounts, as may be appropriate.

(h) Discounts allowed for prompt payment of taxes shall be credited to the account to which the taxes are chargeable.

(i) Interest on tax assessments which are not paid when due shall be included in the Interest and Related Items account.

(j) Taxes paid by the company under tax-free covenants on indebtedness shall be charged to the Nonoperating Income and Expense account.

(k) Sales and use taxes shall be accounted for, so far as practicable, as part of the cost of the items to which the taxes relate.

(l) Taxes on rented telecommunications plant which are borne by the lessee shall be credited by the owners to the Miscellaneous Revenue account, and shall be charged by the lessee to the appropriate Plant Specific Operations Expense account.

§ 76.1236 Nonoperating income and expense.

(a) The nonoperating income and expense accounts are intended to record the results of transactions, events and circumstances affecting the company during a period and which are not operational in nature. They shall include such items as nonoperating taxes, dividend income and interest income. Whenever practicable the inflows and outflows associated with a transaction or event shall be matched and the result shown as a net gain or loss.

(b) This account shall include dividends on investments in common and preferred stock, which is the property of the company, whether such stock is owned by the company and held in its treasury, or deposited in trust (except in sinking or other funds, or otherwise controlled. These accounts shall not include dividends or other returns on securities issued or assumed by the company and held by or for it, whether pledged as collateral, or held in its treasury, in special deposits, or in sinking or other funds. Dividends on stocks of other companies held in sinking or other funds shall be credited to the this account. Dividends received and receivable from affiliated companies accounted for on the equity method shall be included in the Investments in Affiliated Companies account, as a reduction of the carrying value of the investments.

(c) This account shall include interest on securities, including notes and other evidences of indebtedness, which are the property of the company, whether such securities are owned by the company and held in its treasury, or deposited in trust (except in sinking or other funds, see paragraph (d) to this section) or otherwise controlled. It shall also include interest on bank balances, certificates of deposits, open accounts, and other analogous items. There shall be included in this account for each month the applicable amount requisite to extinguish, during the interval between the date of acquisition and date of maturity, the difference between the purchase price and the par

value of securities owned, the income from which is includable in this account. Amounts thus credited or charged shall be concurrently included in the accounts in which the securities are carried. This accounts shall not include interest or other returns on securities issued or assumed by the company and held by or for it, whether pledged as collateral, or held in its treasury, in special deposits, or in sinking or other funds. Cash discounts on bills for material purchased also shall not be included in this account.

(d) This account shall include the income accrued on cash, securities issued by other companies, and other assets (not including securities issued or assumed by the company) held in sinking and other funds. There shall be included in this account for each month the applicable amount requisite to extinguish, during the interval between the date of acquisition and the date of maturity, the difference between the purchase price, and the par value of securities held in sinking or other funds. Amounts thus credited or charged shall be concurrently included in the accounts in which the securities are carried.

(e) This account shall be credited with such amounts as are charged to the cable services plant accounts for the purpose of recording an allowance for funds used for construction purposes.

(f) This account shall include gains or losses resulting from the disposition of gains or losses from the disposition of land or artworks; disposition of plant with traffic; and disposition of nonoperating cable services plant not previously used in the provision of cable services.

(g) This account shall include all other items of income and gains or losses, including:

(1) Fees collected in connection with the exchange of coupon bonds for registered bonds;

(2) Gains or losses realized on the sale of temporary cash investments or marketable equity securities;

(3) Uncollectible amounts previously credited to Accounts 7310 through 7350, inclusive;

(4) Net unrealized losses on investments in current marketable equity securities;

(5) Write-downs or write-offs of the book costs of investment in equity securities due to permanent impairment;

(6) Gains or losses of nonoperating nature arising from foreign currency exchange or translation;

(7) Gains or losses from the extinguishment of debt made to satisfy sinking fund requirements;

(8) Amortization of Goodwill;

(9) Company's share of the earnings or losses of affiliated companies accounted for on the equity method; and

(10) The net balance of the revenue from and the expenses (including depreciation, amortization and insurance) of property, plant, and equipment, the cost of which is includable in the Nonoperating Plant account.

(h) This account shall include the following costs, which are presumed to be excluded from the cost of service in setting rates:

(1) Lobbying includes expenditures for the purpose of influencing public opinion with respect to the election or appointment of

public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances, or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises, or for the purpose of influencing the decisions of public officials. This also includes advertising, gifts, honoraria, and political contributions. This does not include such expenditures which are directly related to communications with and appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposes operations;

(2) Contributions for charitable, social or community welfare purposes;

(3) Membership fees and dues in social, service and recreational or athletic clubs and organizations;

(4) Penalties and fines paid on account of violations of statutes. This account shall also include penalties and fines paid on account of violations of U.S. statutes including judgments arising from a violation of antitrust laws; and

(5) Abandoned construction projects.

§ 76.1237 Nonoperating taxes.

(a) The Nonoperating Tax accounts shall include taxes arising from activities which are not a part of the central operations of the entity.

(b) This account shall be charged and the Unamortized Nonoperating Investment Tax Credits--Net account, shall be credited with investment tax credits generated from qualified expenditures related to other operations which the company has elected to defer rather than recognize currently in income.

(c) This account shall be credited and the Unamortized Nonoperating Investment Tax Credits - Net account shall be charged with the amortization of each year's investment tax credits included in such accounts relating to amortization of previously deferred investment tax credits of other property or regulated property, the amortization of which does not serve to reduce costs of service (but the unamortized balance does reduce rate base) for ratemaking purposes. Such amortization shall be determined with reference to the period of time used for computing book depreciation on the property with respect to which the tax credits relate.

(d) This account shall be charged and the Income Taxes--Accrued account shall be credited for the amount of nonoperating Federal income taxes for the current period. This account shall also reflect subsequent adjustments to amounts previously charged. Taxes shall be accrued each month on an estimated basis and adjustments made as later data becomes available. Companies that adopt the flow-through method of accounting for investment tax credits shall reduce the calculated provision in this account by the entire amount of the credit realized during the year. Tax credits, other than investment tax credits, if normalized, shall be recorded consistent with the accounting for investment tax credits. No entries shall be made to this account to reflect interperiod tax allocation.

(e) This account shall be charged and the Income Taxes--Accrued account should be credited for the amount of state and local income taxes for the current period. This account shall also reflect subsequent adjustments to amounts previously charged. Taxes shall be accrued each month on an estimated basis and adjustments made as later data becomes available. No entries shall be made to this account to reflect interperiod tax allocation.

(f) This account shall be charged and the Other Taxes--Accrued account shall be credited for all nonoperating taxes, other than Federal, state and local income taxes, and payroll related taxes for the current period. Among

the items includable in this account are property, gross receipts, franchise and capital stock taxes. This account shall also reflect subsequent adjustments to amounts previously charged.

§ 76.1238 Interest and related items.

(a) This account shall include the current accruals of interest on all classes of debt the principal of which is includable in the Funded Debt account. It shall also include the interest on funded debt the maturity of which has been extended by specific agreement. It shall not include charges for interest on funded debt issued or assumed by the company and held by or for it, whether pledged as collateral or held in its treasury, in special deposits or in sinking or other funds. Interest expressly provided for and included in the face amount of securities issued shall be charged at the time of issuance to the Other Prepayments accounts and cleared to this account as the term expires to which the interest applies. This account shall also include monthly amortization of balances in the Premium on Long-Term Debt account and the Discount on Long-Term Debt account.

(b) This account shall include the interest portion of each capital lease payment.

(c) This account shall include the monthly amortization of the balances in the Unamortized Debt Issuance Expense account.

(d) This account shall include all interest deductions not provided for elsewhere, including:

(1) Advances from affiliated companies;

(2) Advances from nonaffiliated companies and other liabilities

(3) Assessments for public improvements past due;

(4) Bond coupons, matured and unpaid;

(5) Claims and judgments;

(6) Customers' deposits;

(7) Funded debt mature, with respect to which a definite agreement as to extension has not been made;

(8) Notes payable on demand or maturing one year or less from date of issue;

(9) Open accounts;

(10) Tax assessments, past due; and

(11) Discount, premium, and issuance expense of notes maturing one year or less from date of issue.

§ 76.1239 Extraordinary items.

(a) This accounts is intended to segregate the effects of events or transactions that are extraordinary. Extraordinary events and transactions are distinguished by both their unusual nature and by the infrequency of their occurrence, taking into account the environment in which the company operates. This accounts shall also include the related income tax effect of the extraordinary items.

(b) This account shall be credited with nontypical, noncustomary and infrequently recurring gains which would significantly distort the current

year's income computed before such extraordinary items, if reported other than as extraordinary items.

(c) This account shall be debited with nontypical, noncustomary and infrequently recurring losses which would significantly distort the current year's income computed before such extraordinary items, if reported other than as extraordinary items.

(d) This account shall be charged or credited and the Income Taxes--Accrued account shall be credited or charged for all current income tax effects (Federal, state and local) of items included in subsection (b) and (c) of this section

(e) This account shall be charged or credited, as appropriate, with a contra amount recorded to the Net Noncurrent Deferred Nonoperating Income Taxes account or the Net Current Deferred Nonoperating Income Taxes account for the income tax effects (Federal, state and local) of items included in subsection (b) and (c) of this section that have been deferred.

§ 76.1240 Nonregulated net income.

(a) This account shall be used by those companies who offer nonregulated activities that do not involve the joint or common use of assets or resources used in the provision of both regulated and nonregulated products and services, and which have not established a separate subsidiary for that purpose.

(b) All revenue and expenses (including taxes) incurred in these nonregulated activities shall be recorded on separate books of account for such operations.

§ 76.1241 Glossary of terms.

When used in this system of accounts:

"Account" means a specific element of a chart of accounts used to record, classify and accumulate similar financial transactions resulting from the operations of the entity. "Accounts" or "these accounts" refer to the accounts of this system of accounts.

"Accounting System" means the total set of interrelated principles, rules, requirements, definitions, accounts, records, procedures and mechanisms necessary to operate and evaluate the entity from a financial perspective. An accounting system generally consists of a chart of accounts, various parallel subsystems and subsidiary records. An accounting system is utilized to provide the necessary financial information to users to meet judiciary and other responsibilities.

"Affiliated companies" means companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the accounting company. See also Control.

"Amortization" means the systematic recoveries, through ratable charges to expense, of the cost of assets.

"Associated equipment" means that equipment which functions with a specific type of plant or with two (2) or more types of plant, e.g., switching equipment, network power equipment, circuit equipment, common channel network signaling equipment or network operations equipment. Associated equipment shall be classified to the account appropriate for the type of equipment with which it is predominately used rather than on its own characteristics.

"Book cost" means the amount at which property is recorded in these accounts, without deduction of related allowances.

"Company" or **"the company"** when not otherwise indicated in the context, means the accounting entity.

"Control" (including the terms **"controlling," "controlled by,"** and **"under common control with"**) means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts affiliated companies, contract, or any other direct or indirect means.

"Cost," except as applied to cable services plants, franchises, and patent rights, means the amount of money actually paid (or the current moneyvalue of any consideration other than money exchanged) for property or services. See also Original Cost.

"Cost of removal" means the cost of demolishing, dismantling, removing, tearing down, of otherwise disposing of cable services plant and recovering the salvage, including the cost of transportation and handling incident thereto.

"Depreciation" means the loss not restored by current maintenance, incurred in connection with the consumption or prospective retirement of cable services plant in the course of service from causes which are known to be in current operation, against which the company is not protected by insurance, and the effect of which can be forecast with a reasonable approach to accuracy. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in technology, changes in demand and requirements of public authorities.

"Intangible property" means assets that have no physical existence but instead have value because of the rights which ownership confers.

"Minor items," as applied to depreciable cable services plant, means any part or element of such plant, which when removed, (with or without replacement) does not initiate retirement accounting.

"Original cost" or **"cost,"** as applied to cable services plant, rights of way and other intangible property, means the actual money cost of (or the current money value of any consideration other than money exchanged for) property at the time when it was first dedicated to use by a cable operator, whether the accounting company or by predecessors.

For the application of this definition to property acquired from predecessors see § 76.1600(b)(1). Note also the definition of Cost in this section.

"Plant retired" means plant which has been removed, sold, abandoned, destroyed, or otherwise withdrawn from service.

"Retirement units," as applied to depreciable cable services plant, means those items of plant which when removed (with or without replacement) cause the initiation of retirement accounting entries.

"Salvage value" means the amount received for property retired, if sold, or if retained for reuse, the amount at which the material recovered is chargeable to the Material and Supplies account or other appropriate account.

"Subsidiary record" means accumulation of detailed information which is required by this Commission to be maintained in support of entries to the accounts.

"Subsidiary record categories" means those segregations of certain regulated costs, expenses and revenues which must be maintained and are subject to specific reporting requirements of this Commission.

"Subsystems, parallel mechanisms" means processes or procedures which augment the use of a chart of accounts in the financial operation of the entity. These subsystems operate on and/or process account and subsidiary record information for specific purposes.

"Time of installation" means the date at which cable services plant is placed in service.

"Time of retirement" means the date at which cable services plant is retired from service.

"Tangible property" means assets characterized by physical existence, such as land, buildings, equipment, furniture, fixtures and tools.

Attachment D

Cost of Equity Analysis

1. Commenters submit studies by four experts.[598] CATA presents a capital asset pricing model (CAPM) study analyzing cable surrogates and cable companies prepared by Peter K. Pitsch (Pitsch). Cablevision Industries also submits a CAPM study prepared by the Brattle Group (Brattle). Bell Atlantic submits a discounted cash flow (DCF) analysis of the S&P 400 as a cable surrogate prepared by James H. Vander Weide (Vander Weide). Comcast and COA submit a comparable earnings study prepared by AUS Consultants (AUS).

A. Cost of Equity Approaches

2. Risk premium analysis. Risk premium analyses estimate the cost of equity by adding a risk premium to the yield on alternative relatively risk-free investments such as bonds. The risk premium is usually based on a comparison of historic realized returns on stocks and bonds. The current yield on a bond provides an easily determined reference point for current investor expectations on inflation and the general state of the economy.

3. The parties submitting risk premium analyses relied upon the CAPM variant of this methodology. CAPM uses a general risk premium, based on the differences in return on a risk-free investment and a diversified portfolio of risk-bearing investments, and adjusts it for the target stock's variance in return relative to that of a diversified portfolio.[599] This adjustment is performed through the following formula:

COE = RF + (beta * RP), where

COE is the cost of equity estimate,

RF is the current yield on risk-free investment,

RP is the risk premium that compensates for the difference in the risk of a diversified, risk-bearing portfolio and a risk-free investment, and

---

[598] These submissions were made in August 1993 and appear to be based on 1992 and early 1993 data.

[599] CAPM practitioners generally assume United States Treasury bills provide a certain (i.e., risk-free) return. The stockmarket overall is used as a proxy for all possible risk-bearing investments, based on the view that it offers investments in almost every conceivable line of business.

beta is a measure of a stock's unavoidable variance in return (i.e., non-diversifiable risk).

4. The CAPM beta is based on the widely accepted tenet of finance theory that investors require compensation only for risk (that is, variance in return) that cannot be avoided by holding a diversified investment portfolio. This risk (beta) is often estimated by comparing past variations in the return on the stock and on the stockmarket overall. A CAPM analysis of a portfolio containing all possible investments would produce a beta of one. The S&P 400 is generally assumed to have a beta of one.

5. In a previous proceeding we recognized CAPM's potential as a methodology for estimating the cost of capital.[600] However, we found problems in that proceeding -- unrealistic risk premiums and betas -- that precluded our acceptance of CAPM analyses at that time.[601]

6. DCF Analysis. The Commission has relied upon the DCF method extensively in the past. This was the underlying method proposed in the Notice. The DCF methodology employs dividend and stock price data to estimate the return on equity needed to satisfy investor risk expectations. It does so based on the following equation:

$$Ke = D/P + G, \text{ where}$$

Ke = the DCF estimate of the cost of equity,

D = the expected annual common stock dividend,

P = the current price of a share of common stock, and

G = the estimated long-term growth rate of earnings.

7. D/P, or the current yield, is estimated by dividing the projected dividend for the next year by the current common stock price. Long-term growth is based on analysis of published estimates of growth such as are available to investors. In the Notice, we cautioned that applying the DCF method to companies with no current dividends requires careful attention from the

---

[600] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7523-24, ¶¶ 133-39 (1990) (1990 Telco Represcription Order), recon. denied 6 FCC Rcd 7193 (1993), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993) (Illinois Bell).

[601] 1990 Telco Represcription Order, 5 FCC Rcd at 7524, ¶ 139.

analyst to ensure a creditable estimate.[602] In practice, most S&P 400 companies provide investors with a mixture of dividends and capital gains (reflecting reinvested earnings).

8. Comparable Earnings Analysis. The comparable earnings method looks at the ratio of reported earnings to the book value of equity for a group of comparable companies. This method assumes either that the earnings of comparable companies equals the regulated company's cost of capital, or, alternatively, that fairness would allow regulated and nonregulated companies the same risk-adjusted rate of return. The main criticisms of this method are that there is no way to determine whether the comparable companies' earned returns are higher or lower than the regulated company's cost of capital, and that an accounting measure of return is generally not the same as the return realized by stockholders. By contrast, the previous two methods are more market-oriented and take into account both earnings and capital gains.[603]

B. Cost of Equity Studies

1. Summaries

9. Pitsch (CATA). CATA's consultant, Pitsch, offers three analyses. The first provides CAPM estimates of the cost of equity for two cable companies, four companies with mixed cable and other operations, and the seven Regional Bell Holding Companies (RHCs).[604] Using Value Line[605] betas, risk premiums of 6.9% and 7.5%, and a risk-free rate of 5.8%, the estimates are 15.8% to 18.2% for the two cable companies, 12.4% to 17.8% for the mixed cable companies, and 11.3% to 12.6% for the telephone companies. Pitsch concludes that this analysis supports a cost

---

[602] Notice, at n.54.

[603] See Methods Used to Estimate the Cost of Equity Capital in Public Utility Rate Cases: A Guide to Theory and Practice, prepared for the California Public Utility Commission, Charles River Associates, CRA Report 607 (March 1982).

[604] CATA Comments, Peter K. Pitsch, Implementation and Analysis of Cost-of-service Regulation for the Cable Service Industry at 15 (Pitsch Report). Pitsch analyzed the Class A common stock of two cable companies, Cablevision Systems and TCI. His group of four mixed-operation companies were Comcast, Knight Ridder, Times Mirror, and Time Warner.

[605] Value Line is an investor information publication that periodically issues financial and stock market statistics for popular stocks.

of equity for cable companies of between 16% and 18%.[606]

10. The second Pitsch analysis adds a 6% "risk premium" to the May 1993 yields on bonds of seven cable operators, seven companies with mixed cable and other operations, and the seven RHCs. The three distinct bond yields reported for the cable and mixed cable companies produce equity estimates of 14.1%, 14.8% and 16.6%. Estimates for the RHCs are 13.6%, 14.1%, and 14.2%. Pitsch concludes that this analysis supports an equity range of 15% to 17%.[607]

11. The third Pitsch analysis applies CAPM to the S&P 400 (assumed beta of 1.0), to a hypothetical stock with a beta of 1.5, and to TCI's stock with a 1993 beta of 1.65. Pitsch calculates a risk premium of 5%, which reflects the risk differential between the lowest two quartiles of S&P 400 DCF cost of equity estimates and "Aa" rated utility bond yields, plus a 1.7% risk differential between bonds and U.S. Treasury bills.[608] Using betas of 1.0, 1.5 and 1.65, and a risk-free rate of 5.8%, Pitsch reports cost of equity estimates of 12.5%, 16%, and 17%, respectively.

12. Pitsch concludes that his analyses produce estimates of the cost of equity of 18%, 16%, and 17%. He recommends that the cost of equity be set at 18%.[609]

13. Brattle (Cablevision Industries). Brattle estimates a cable risk premium add-on to any S&P 400 overall cost of capital estimate. Brattle calculates betas for eleven stocks issued by seven cable operators.[610] The betas range from 0.84 to 2.41. The average beta for 1993 is 1.74. Brattle adopts a CAPM risk premium of 8.2%, stating that this number is supported by considerable evidence. Most of Brattle's analysis attempts to adjust for the capital structure differences between S&P 400 and cable companies. Brattle assumes a "debt beta" of 0.25 for the

---

[606] Id. at 17.

[607] Id. at 18.

[608] Id. at 21. As the source for the 5% risk premium Pitsch cites the Notice at ¶ 52.

[609] CATA Comments, Pitsch Report at 21.

[610] Cablevision Industries Comments, A. Lawrence Kolbe and Lynda S. Borucki, Rate of Return Issues in Cable Television Cost-of-Service Regulation, (Brattle Return) at 15 & Table 2. The cable companies analyzed are: Adelphia, Cablevision Systems, Century, Comcast (Class A and Special stock), Jones (three stock issues), TCA, and TCI (Class A and B stock).

S&P 400 and 0.5 for the cable industry, based on a calculation that divides yield differences between various grades of long-term bonds and short-term United States Treasury bills by the 8.2%.[611]

14. Brattle attempts to create "unlevered betas" by averaging cable stock betas and the cable "debt beta," weighted by the market value of cable equity and the book value of cable debt. Brattle then "relevers" by averaging the "unlevered betas" and the S&P 400 "debt beta," weighted by an assumed 50% debt/50% capital structure for the S&P 400. Brattle's incremental risk premium is the difference between the average relevered cable beta (1.55) and the average S&P 400 beta (1.0), multiplied by its assumed risk premium, and adjusted by the assumed S&P 400 debt/equity ratio.[612] Brattle does not provide an estimate of the cost of equity.

15. Vander Weide (Bell Atlantic). James H. Vander Weide rejects estimating the cost of capital from cable industry data, maintaining that most cable companies are either closely held, widely diversified, or pay no dividends. To identify a surrogate group with overall risks similar to cable, he considers separately the business and financial risks of cable. He quotes Creditweek:

> Industry risk remains low, relative to the average industrial company, due to the stability of service demand, continuing subscriber growth, and the predictability of cash-flow generation. Through the recession and slow recovery, a period of low consumer confidence, demand for cable TV service has increased.[613]

Vander Weide argues that cable has very low business risk due to its "stability of service demand" resulting from most communities granting a franchise to one company; "continuing subscriber growth" resulting from innovations in cable capacity; and "predictability of cash flow generation" resulting from high market penetration, recession resistance, and low post-construction maintenance costs. Looking at business risk alone, he maintains that cable would be less risky than local telephone companies because cable still faces no multichannel competitor in

---

[611] Cablevision Industries Comments, Brattle Return at 20, B-3.

[612] Id. at 19, Table 4 following p.19, B-3, B-6.

[613] Bell Atlantic Comments, Vander Weide Affidavit at 11, quoting Standard & Poor's Creditweek, at 51 (Apr. 5, 1993).

its local markets.[614]

16. Turning to the financial risk, Vander Weide states that this low business risk is partially offset by cable's reliance on debt financing. He quotes from Creditweek:

> Easy availability of debt financing through bank borrowings and high-yield debt markets enabled cable operators to acquire smaller players in a market characterized by rising cable system prices and cash flow multiples. Rising asset values and the liquidity of this market gave lenders confidence that, should borrowers experience financial difficulties, a few properties could be sold at a premium to pay down debt.[615]

He notes that the combination of easy debt financing and start-up losses have left many cable operators with negative net worth on their books (i.e., with capital structures showing debt exceeding total assets).

17. Based on the cable industry's current high financial risk, Vander Weide recommends that the third quartile of the S&P 400 be used as the surrogate for the cable industry's cost of equity capital.[616] He maintains that the third quartile S&P 400 companies have significantly more business risk than the average cable operator, but that the S&P companies also finance their operations with significantly more equity. Based on business risk alone, however, he would recommend the first quartile of the S&P 400 as the equity return surrogate for cable.

18. Vander Weide estimates the current cost of equity capital for the companies composing the S&P 400 using the DCF method the Commission has applied to the telephone industry. The lowest quartile of the S&P 400, ranked by estimate, has an

---

[614] Vander Weide Affidavit at 8, 11-14, & Appendix 2.

[615] Id. at 12, quoting Standard and Poor's Creditweek, at 6 (Feb. 24, 1992).

[616] Vander Weide followed the methodology we employed in the 1990 Telco Represcription Order, 5 FCC Rcd at 7513, ¶¶ 57-60. In that proceeding, the S&P 400 companies for which sufficient data were available to make DCF calculations were viewed as a large group of publicly-traded companies that was roughly representative of the universe of nonregulated companies. By ranking the companies in order of their DCF cost of equity estimates, and grouping them into quartiles (the first quartile being the lowest) the Commission obtained a sense of the investor-required returns for a wide range of firms.

average cost of equity of 11.80%; the third quartile has an average cost of equity of 15.11%. For the S&P 400 overall, the average cost of equity is 14.58%.

19. In its reply, Comcast attempts to rebut Vander Weide through an analysis prepared by George R. Schink. Schink contends that Vander Weide is incorrect in asserting that cable is less risky than telephone and that cable and telephone are converging. Schink argues that comparisons of size, financial leverage, profits, financial ratios, and stock betas show less risks for the RHCs than for the three assertedly "pure play" cable operators (Cablevision Systems, Comcast, and TCI). Schink asserts that two small independent telephone companies earned higher returns than the RHCs and, thus, that smaller companies have higher costs of equity capital. Schink further contends that smaller telephone operating units earned higher returns in 1991, that cable franchises are smaller than telephone operating companies, and, thus, that cable has a higher cost of capital than telephone. He asserts that the average cable system has 5,026 subscribers, and that the smallest telephone operating unit for which he had data had 7,940 access lines and a return on equity of 20.2% in 1991.[617]

20. AUS (Comcast and COA). AUS prepared a study that was submitted by Comcast and COA with their comments in this proceeding. AUS proposes four groups of firms it believes are comparable to cable, and estimates the cost of capital based on historic and future earnings.[618]

21. The first group consists of seventy S&P industrial companies selected from within the S&P 400 using two criteria that AUS derived from Value Line data on five cable companies for which it publishes data. The first criterion screens out companies having betas more than three standard deviations from the 1.41 average of the five cable betas (0.98 - 1.84). The second criterion screens out companies that do not have the large avoidable risks of the cable companies over the past five years.[619]

---

[617] Comcast Reply, Schink Affidavit at 3, 7-18, & Appendices 2-9.

[618] Comcast Comments, AUS Consultants at 7. COA files AUS's full U.S. Cable Television Industry White Paper, of which the rate of return study filed by Comcast is a part, as an attachment to its comments. All page references herein are to the Comcast attachment; the parallel text in the COA attachment begins at page 59.

[619] Comcast Comments, AUS Consultants at 15.

22. AUS's remaining three comparable groups consist of firms that AUS asserts compete with cable. AUS's telecommunications group includes the seven RHCs and the five largest independent telephone companies. AUS's broadcast group includes all five Value Line broadcasting companies. AUS's preferred recreation group includes all Value Line movie, local leisure, and vacation/resort service companies.[620]

23. AUS estimates the cost of equity using the Value Line 5-year historic returns on net worth and the Value Line 3-year projected returns. These returns range from 12.5% to 21.1%. AUS subdivides each of its groups into preferred and alternative groups. For AUS's preferred groups, historic and forecast returns average 14.6% and 17.4%, respectively. Based on a table referenced by AUS, the recommended equity return appears to be centered on 16%, with upper and lower bounds of 17.3% and 14.7%.[621]

2. Analysis

24. CAPM Estimates. Brattle, Pitsch, and Economist, Inc. all rely heavily on CAPM and estimates of beta for a small number of cable companies: Adelphia, Cablevision Systems, Century, Comcast, Jones, TCA, and TCI.[622] These analysts all implicitly assume that these betas represent an accurate indicator of the risks associated with the provision of regulated cable service. Based on the record before us, we do not find this implicit assumption to be valid.

25. CAPM assumes a competitive market in which no single investor can affect the price of a stock through his or her buying or selling.[623] It is not clear that any of the analyzed cable stock issues meet that assumption:

> Adelphia's Class A stock (carries 1 vote and the right to elect 1 director) has 74 holders of record, including officers and key employees. Adelphia's Class B stock (10 votes and the right to elect remaining directors) is held by 7 people, primarily by Rigas family members. Brattle

---

[620] Id. at 16-17.

[621] Id. at 7, 18, & Exhibit 6 at 3.

[622] Although Time Warner is a major cable operator, cable provided only $2 billion of its $13 billion in revenues for 1992. See Time Warner Annual Report for 1992, at 61.

[623] Edwin J. Elton and Martin J. Gruber, Modern Portfolio Theory and Investment Analysis, 275 (Wiley 1981).

reports Adelphia's stock beta was 1.98 in 1993.[624]

Cablevision is controlled by a single shareholder, and insiders own 19% of Class A and 55% of Class B shares.[625] Brattle reports a beta of 1.86.

Comcast insiders own 20% and control 80% of its stock.[626] Brattle reports Comcast's Class A common stock beta has risen from approximately 1 between 1987 and 1989 to 1.56 in 1993.

Glenn R. Jones owns 89% of Jones Spacelink has its Class A and 100% of its Class B stock owned by .[627] Jones Intercable has 58% of the common stock owned by Glenn R. Jones. Brattle reports 1993 betas of 1.48 for Jones Intercable, 1.93 for Jones Intercable Class A, and 2.41 for Jones Spacelink.

TCI insiders control 8.55% of Class A and 68.3% of Class B (carries right to 10 votes) stock.[628] Brattle reports TCI's Class B stock beta rose from 1.05 in 1987 to 1.35, and that the Class A beta rose from 1.35 to 1.74 in the same period.[629]

26. The Value Line reports cited above also list a constant stream of insider decisions to buy, sell, or exercise options. Insider decisions regarding closely-held stock introduce speculative risks for other investors that magnify the underlying business and financial risks of the companies. We believe that betas incorporating these insider decisions overstate the risks of supplying equity capital for regulated cable service.

27. The CAPM presentations all rely on the stock performance of the cable companies over the last five years to estimate beta. The history of the cable industry over the last five years is replete with unique events, not the least of which was the ultimate passage of legislation regulating the industry.

---

[624] SEC Form 10K, Adelphia, 1993 fiscal year, at 27; Cablevision Industries, Brattle Return, Table 2.

[625] Value Line, CableVision 'A' (Dec. 24, 1993).

[626] Value Line, Comcast Corp (June 25, 1993).

[627] SEC Form S-3, Jones Intercable, at 7 (June 4, 1992).

[628] Value Line, Tele-Com. 'A' (Dec. 24, 1993).

[629] We were unable to obtain information about Century and TCA.

By relying on historic betas, these analysts have chosen data that incorporate speculative risks that bear no relationship to the future risks of regulated cable service. Further, we believe that most volatile component investor risk and return expectations for cable services has been the exercise of monopoly market power. Thus, even if the historic beta could be adjusted to provide an accurate estimator of cable, it would still require an additional, downward adjustment for the monopoly profit component of investor expectations. It seems improbable that investor expectations of the risks associated with cable company stocks are accurately portrayed by the mechanical application of the beta formula. In these circumstances, we must conclude that the Brattle and Pitsch analyses fail to measure accurately the cost of equity for regulated cable service.[630] While it is conceivable that those analyses could be reformed to make CAPM a useful tool for determining that cost of equity, the parties have not attempted to analyze what a forward-looking beta might be, nor have they provided the information that would allow us to perform our own analysis.

28. DCF Estimates. This Commission and other agencies have relied upon DCF analyses on numerous occasions to estimate the cost of equity.[631] Most recently, in the 1990 Telco Represcription Order, we used DCF cost of equity estimates for the S&P 400 as a benchmark in establishing a reasonable zone for the cost of equity for LEC interstate access service. We examined criticisms of that method presented by parties that urged higher costs of equity than that indicated by the DCF method. We applied that method to the RHCs, a large group of public utilities, and to the S&P 400.[632] Although we gave the greatest weight to the DCF cost of equity estimates for the RHCs, we gave significant weight to DCF cost of equity estimates for the S&P 400 as a source of benchmarks to determine investor required returns.[633] Vander Weide also relies on DCF cost of

---

[630] Economist, Inc., which estimates betas of 1.03 to 1.53 for unspecified stock issues for six cable companies, also fails to recognize that historic betas do not accurately portray the underlying future risks of regulated cable service.

[631] See, e.g., 1990 Telco Represcription Order, 5 FCC Rcd at 7530-31, ¶¶ 174-88; Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Report and Order, CC Docket No. 84-800, Phase III, 51 Fed. Reg. 32920, ¶¶ 45-46 (1986) (1986 Represcription Proceeding), recon. denied, 2 FCC Rcd 5636 (1987).

[632] 1990 Telco Represcription Order, 5 FCC Rcd at 7514-15, ¶¶ 54-75.

[633] Id. at 7530-31, ¶¶ 174-188.

equity estimates for the S&P 400.

29. The D.C. Circuit affirmed the 1990 Telco Represcription Order on review. The Court determined that we had acted reasonably in relying on the DCF method.[634] The Court also noted that "[f]inding unregulated companies of comparable risk is an extremely tricky process"[635] and implicitly approved our reliance on DCF cost of equity estimates for the S&P 400.[636]

30. Comparable Group Estimates. AUS's first analysis of proposed comparable firms is its group of seventy industrial companies screened from the S&P 400 using two CAPM concepts, unavoidable risk (as measured by beta) and avoidable risk. The beta screen covers a broad range (0.98 to 1.84) and mainly excludes below-average risk companies. This screen is consistent with the CAPM tenet that unavoidable risk is a key risk factor for investors. AUS used this screen to reflect the historically high betas of a small group of cable stocks. As we have stated, these betas overstate the risks of supplying equity capital for regulated cable service.[637]

31. The avoidable risk screen requires that companies have avoidable risk similar to that of cable companies. AUS used this screen despite CAPM's rejection of avoidable risk as a factor in investor risk calculations since it is readily eliminated by portfolio diversification.[638] AUS offers no rationale for using this screen. Because we perceive no basis for assuming that this screen is a valid method of selecting comparable firms, we decline to rely on this AUS analysis.

32. Further, a key test of a comparable group analysis is whether the selected companies appear to form a roughly homogeneous group with characteristics generally comparable to the target service.[639] The AUS industrial group contains many companies that are neither obviously parallel to cable service nor seemingly similar to each other -- e.g., Avon, Bethlehem Steel, Mattel, and Intel. This lack of comparability confirms the inadequacy of AUS's screens.

---

[634] Illinois Bell Tel. Co. v. FCC, 988 F.2d at 1259-64.

[635] Id. at 1262.

[636] See id. at 1262-64.

[637] See ¶ 26, supra.

[638] Comcast Comments, AUS Consultants at 13, 14-15.

[639] See 1990 Represcription Order, 5 FCC Rcd at 7526, para. 161.

33. AUS's remaining three groups consist of companies that assertedly compete with cable. AUS provides no basis for believing that investors see these companies as having the same risks as cable. AUS's preferred recreation group does not seem to be comparable to a regulated monopoly providing cable service.[640] This group includes movie producers (Paramount and Disney), vacation resort operators (Club Med and Carnival Cruise), and a video game producer (Electronic Arts). It also includes companies with unusually high historic and projected returns. (Cedar Fair has 60% historic and projected annual returns; Avon has 55% and 46% historic and projected returns; and King World, which appears in this group and in the industrial group, had a one-year return exceeding 117%.)[641] We find no basis for concluding that these groups' earnings approximate the cost of equity for regulated cable service, or that fairness requires that we allow regulated cable service returns of this magnitude.

---

[640] Id. at Exhibit 5, p.8.

[641] AUS asserts that its telecommunications group currently competes with cable, but its discussion emphasizes the non-comparability of telephone and cable. Id. at 15. For all comparable groups, AUS calculates the historic return on net worth leaving out negative values. Thus, for example, AUS reports Cumins Engine's equity return as 13.4%, when the actual average (including negative returns) is -2.8%. AUS does not comment on this procedure. Comcast Comments, AUS Consultants, Exhibit 2, p.2; Exhibit 4, p.2; Exhibit 5, p.8. Missing values for Cumins Engine were calculated from Value Line (Nov. 12, 1993) report by dividing net profit by net worth. We find AUS's procedure introduces an upward bias in its estimates of the cost of equity capital.

February 22, 1994

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Fourth Order on Reconsideration, Fourth Report and Order)

With today's actions, the Commission revises its cable rate regulations by modifying the benchmark methodology, which serves as the primary approach for regulating cable service rates. In a separate rulemaking, the Commission establishes requirements to govern cost-of-service showings to justify rates above the levels determined by the benchmark approach.

The Commission's decision affirms a benchmark methodology and establishes a new competitive differential at 17% relative to September 1992 rate levels to guide rate reductions. Accordingly, the revised rules will require systems to reduce rates by 17% from their September 1992 level, or to the new benchmark, whichever is less. Once systems make their necessary reductions to comply with the new benchmark mechanism, they are permitted to add external costs and to apply a "going forward" adjustments for additional channels or system upgrades. Systems that have reduced rates by 17% (i.e., a prior 10% adjustment under the old benchmark and an additional 7% under the new benchmark), also may make adjustments for inflation.

In addition, these revised rules will initiate cost studies to verify cost differences among cable operators in comparison to the competitive differential. Systems that are required to reduce their rate by an amount less than the full 17% competitive differential -- as well as systems with rates below the new benchmark level that are not required to make any immediate reductions -- will be required to engage in future rate actions in accord with the results of the cost studies. As further elements of the cable rate regulation package, the Commission establishes (1) a mechanism to allow "going forward" adjustments for additional channels and system upgrades, and (2) a standard for targeted rate relief, as well as provisions for administrative relief, to small operators.

During this proceeding, I have consistently stated that the Commission must implement rate regulations in an orderly and effective manner in order to maintain the integrity of our regulatory process, to avoid creating potential unintended consequences, and to minimize false expectations among the consumer public.[642] I have also stated that the Commission's rate

---

[642] See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett). See also First Order on Reconsideration in MM Docket No. 92-266, FCC 93-248, released August 27, 1993, 58 FR 46718 (Separate

regulation mechanisms must (1) incorporate measures of flexibility in order to balance the concerns of the industry, consumers, and franchising authorities, and (2) minimize the uncertainty that has resulted from the cable rate regulation proceeding so that consumers and the industry may develop realistic expectations and business plans, respectively.[643]

I write separately today in order to emphasize that my decision to support this rate regulation package is based on the measure of flexibility built into a benchmark system of regulation, including several of the "going forward" and "cost-of-service" components. Given the lack of complete information on pricing and costs, and our relatively limited sample for competitive and noncompetitive pricing behavior, I believe that a revised benchmark approach exercises the necessary caution in recognizing the variety of cost structures and pricing practices throughout the cable industry. During the reconsideration process, the Commission has revised the benchmarks by correcting the data on competitive and noncompetitive systems as well as refining the statistical procedure for estimating the benchmarks. Therefore, I believe that the benchmark information, although arguably subject to certain shortcomings detailed in this proceeding's record, now forms a better foundation for other components of the rate regulation package, especially the "going forward" allowances for channel additions and upgrades.

Next, I believe that the other components in this rate regulation package -- including the "going forward" methodology, the presumptions established to guide decisions regarding "a la carte" practices, and the provisions for a measure of small system relief -- will provide necessary flexibility to allow operators to begin to develop future business plans and to add new programming services. With respect to the "going forward" mechanism, I believe that the allowance for actual programming costs may help to avoid unintended consequences for program services as a result of the revised rate regulations. The opportunity for a streamlined cost-of-service showing also will allow operators to account for new services through upgrades of their systems. In addition, I support today's effort to distinguish legitimate "a la carte" marketing practices for programming services from those practices that could constitute evasions of the Commission's rate regulations. In this regard, I believe that the presumptions regarding "a la carte" practices will enable the Commission to identify legitimate package offerings that increase realistic consumer choices and provide for a reasonable number of programming services at favorable rates. Finally, the Commission has provided for a measure of rate relief for small operators, which will allow certain small operators to make external cost and "going forward"

Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993).

[643] See Keynote Address by Commissioner Andrew C. Barrett, Federal Communications Commission, Prentice Hall Law & Business Cable Conference; June 28, 1993. See also Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993, 58 FR 41042 (Concurring in Part and Dissenting in Part Statement of Commissioner Andrew C. Barrett); Testimony of Commissioner Andrew C. Barrett, Federal Communications Commission, Before the U.S. House of Representatives, Subcommittee on Telecommunications and Finance, (September 28, 1993); Order, MM Docket No. 92-266, released February 8, 1994 (Separate Statement of Commissioner Andrew C. Barrett).

adjustments to rates regardless of where the rates of these systems fall relative to the benchmark. Nonetheless, I remain concerned that some small operators may find that further relief is necessary in order to avoid particular hardship, and I emphasize that the provision for additional hardship relief to certain small operators, as well as the streamlined cost-of-service mechanism, will become important recourse for small operators in such dire situations.[644]

The revised rules also will initiate a cost study to verify cost differences among cable operators in comparison to the competitive differential. I believe that this study will provide important information to guide the Commission's analysis of the differences among competitive and noncompetitive operators, as well as the operating distinctions that may exist among small, medium and large operators. I also believe that this detailed cost information will enable the Commission to evaluate the validity of many policy assumptions that have guided our efforts in this proceeding, and therefore, will help to identify whether further adjustments are necessary to these refined rate regulations. As a result, I believe that it is appropriate to postpone rate actions as applied to certain systems, especially to small systems and those systems with rates below the new benchmark level, and to base future rate actions for those systems upon the differential, if any, identified by results of the cost study. I especially am interested in the cable industry's full participation in this cost study in order to resolve a notable void in this proceeding's record. As a consequence, I believe that these studies must be completed as soon as possible before the end of 1994 in order to promote the certainty that will enable all operators to develop future business plans.

Based upon my own analysis, I believe that the new competitive differential of 17% as compared to the September 1992 rate levels represents the highest point of what I consider to be an acceptable range for this policy determination. I have previously asked questions regarding the proper procedure for calculating the differential between competitive and noncompetitive rates, especially concerning the effect of the statistical treatment for low penetration and municipal systems on the differential.[645] I am aware that the Commission's revised data and statistical procedures provide analytical support for a 17% differential by focusing primarily on the differences between noncompetitive systems and overbuild systems, while retaining a measured consideration of the low penetration and municipal systems in the competitive sample. Nonetheless, I remain concerned that a more cautious approach for developing a competitive differential would reflect the limited confidence that results from a relatively small sample size and a lack of cost data. Furthermore, I consistently have emphasized the need to consider the effect of the cable rate regulations on industry investment.[646] The freeze on cable revenues and the implementation of the benchmark mechanism have had a negative impact on the cable industry's revenues and kept rates from rising. For example, a recent study states that these

---

[644] The dire financial straits faced by many small operators are well documented in this proceeding, including a letter submitted by the U.S. Small Business Administration, January 27, 1994.

[645] See Rate Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, 58 Fed Reg 29736 (Separate Statement of Commissioner Andrew C. Barrett).

[646] See n. 2.

actions "have already precipitated more than an estimated $2 billion direct loss of revenues and cash flow," while also citing "the complete foreclosure of growth avenues for cable TV programmers."[647] Therefore, I am concerned about the potential effects of the 17% competitive differential relative to the September 1992 rate level. However, I also believe that the entire cable rate regulation package, including our cost-of-service and "going forward" options, incorporates important elements of flexibility that will allow operators to adjust to the 17% differential, where necessary. For example, all systems are permitted to adjust rates for external costs and "going forward" factors. Systems above the benchmark, which are required to reduce their rates by the full competitive differential, are permitted to make adjustments for inflation as accrued between September 1992 and September 1993.

Additionally, I believe that the benefits of the"going forward" mechanism for many operators will occur through the streamlined cost-of-service process, which will be subject to further comments and refinements. Given that this process will affect the incentives for operators to invest toward future system developments and the carriage of new programming services, I am concerned that this streamlined cost showing serve as an important bridge between the benchmark mechanism and the requirements for a full cost-of service showing. The streamlined cost-of-service process will play a critical role within the rate regulation framework, especially through provisions for an incentive-based plan for upgrades and the opportunities to demonstrate separate allocations for improvements to existing regulated services.

With respect to the cost-of-service proceeding, I support various aspects of the Order that grant flexibility to operators with unique cost-based circumstances that justify rates above the new permitted benchmark level. Furthermore, the cost-of-service process includes a rate-of-return factor of 11.25% that is reasonable as compared to other regulated industries, especially after tax considerations are included. I believe that necessary flexibility in the cost-of-service process also occurs through the cost allocation mechanism, the procedure for determining the portion of excess acquisition costs that operators may recover, as well as the provisions for treatment of Subchapter S corporations. As a result, I believe that the range of factors considered in the cost-of-service process, including the option for hardship showing, will begin to mitigate some of the consequences for cable operators who may endure the most significant changes as a result of the new 17% competitive differential.

Finally, I believe that this decision must be viewed in light of the overall package of elements that affect the rate calculations as well as the rate adjustments and cost showings that will be allowed. Therefore, I encourage the industry to await the release of all final orders before assessing the effects of these decisions on their particular markets. In the end, my goal is to ensure that our decisions in this area are balanced and will permit continued investment to

---

[647] See Study by Paul Kagan Associates, January 1994. The record in this proceeding underscores the difficulties created by cable rate regulation for many programmers, including certain programmers that have manifested subscriber increases, in part, by initially offering services at no cost. See Correspondence filed tin MM Docket No. 92-266 by Discovery Communications, February 1, 1994; E! Entertainment Television, February 14, 1994; and United Video, February 14, 1994.

enhance services to the public. These rulemakings on cable rate regulation have involved extremely complex analysis, and I acknowledge the outstanding dedication shown by our Commission staff, my colleagues, and their respective staffs.

*U.S. Government Printing Office: 1994 — 300-842/00026